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# Analysis

EdinLR Vol 17 pp 224-229

## The International Law Implications for an Independent Scotland: Findings of an Expert Legal Opinion Requested by the UK Government

In early February 2013 the UK government made public the first in a series of reports analysing Scotland's place in the UK entitled "Scotland Analysis: Devolution and the Implications of Scottish Independence".<sup>1</sup> Annex A of the Devolution Report is a legal opinion written by the highly regarded international law experts James Crawford SC, Whewell Professor of International Law at the University of Cambridge, and Alan Boyle, Professor of Public International Law at the University of Edinburgh. The Opinion was requested by the UK government and occasioned by the agreement between the UK and Scottish governments to work together to ensure a referendum on Scottish independence takes place by the end of 2014.<sup>2</sup>

At the outset the Opinion makes clear that the status of an independent Scotland would, in large measure, depend on the political negotiations reached between the governments of UK and Scotland before and after the referendum, and on "whether other states accepted their positions on matters such as continuity and succession".<sup>3</sup> It is uncontroversial that two independent nation states would result from Scottish independence and, assuming that any independence would occur based on the agreement of both parties, there is little reason to doubt that both would be recognised as such by the international community.<sup>4</sup> Chief among the relevant legal issues is how international law would characterise an independent Scotland and the remainder of the United Kingdom ("rUK"), as well as how it would characterise the relationship of each to the UK as it currently exists. This characterisation would have a direct impact on the principles that would apply to determining the position of an independent Scotland and the rUK within the various international organisations of which the UK is a member. Three possible characterisations are considered.<sup>5</sup>

1 Scotland Analysis: Devolution and the Implications of Scottish Independence (Cm 8554: 2013).

2 Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland, 15 October 2012, available at [www.number10.gov.uk/wp-content/uploads/2012/Agreement-final-for-signing.pdf](http://www.number10.gov.uk/wp-content/uploads/2012/Agreement-final-for-signing.pdf).

3 Opinion, para 1.

4 The Opinion is premised on an assumption that if Scotland becomes independent it will be with the UK's agreement and not by means of a unilateral secession (para 14).

5 A fourth possibility, that Scotland would be the continuator state of the UK and rUK would be the new state, is rightly dismissed (Opinion, para 50).

### A. RUK AS THE CONTINUATOR STATE OF THE UK AND SCOTLAND AS A NEW STATE

The Opinion outlines several examples of states dividing into two or more new states, where one state is considered the continuator of the original state and the other state (or states) is considered a successor to the original state.<sup>6</sup> In all but one of the cases examined in this category,<sup>7</sup> the state that retained “the majority of the predecessor state’s population and territory”<sup>8</sup> and “substantially the same governmental institutions as the predecessor state” was considered to be the continuator state and the other state(s) the successor(s).<sup>9</sup>

Two examples were considered by the authors to be particularly apposite in the circumstances. One was the split-up of the USSR in 1990-1991. Here the USSR’s permanent United Nations Security Council seat (and its attendant veto) was considered by the international community, with little or no objection, to be assumed by Russia as the continuator state of the USSR.<sup>10</sup> The other remaining entities making up the Commonwealth (other than Belarus and Ukraine which, anomalously, were original members of the UN despite being part of the USSR) were considered to be successor states and, as such, needed to apply in order to gain UN membership. Similarly, in each of the cases considered,<sup>11</sup> the successor state applied to join the United Nations and the continuator state did not.

Another precedent that was relied upon in the Opinion was the creation of the Irish Free State in 1922. The UK emerged as a continuator state and an independent Irish state emerged as a successor. The authors observe that there is no indication “that either party questioned the UK’s continuity; on the contrary [the agreement between the parties] appears to have been premised on the personality of the UK continuing uninterrupted”.<sup>12</sup> Of course the historical relationship between Ireland and the UK is different in nature from that of Scotland and England.<sup>13</sup> Moreover,

6 Examples cited include Singapore’s separation from Malaysia in 1965, with Malaysia being the continuator state and Singapore becoming a new state; the partition of British India in 1947, with India being the continuator state and Pakistan becoming a new state; the separation of Bangladesh from Pakistan in 1971-72, with Pakistan being the continuator state and Bangladesh becoming a new state; Eritrea’s split from Ethiopia in 1993, with Ethiopia being the continuator state and Eritrea becoming a new state; the breakup of Serbia and Montenegro in 2006, with Serbia being the continuator state and Montenegro becoming the new state; and the separation of South Sudan from Sudan in 2011, with Sudan being the continuator state and South Sudan becoming the new state.

7 The exception was the separation of Bangladesh from Pakistan. There, while the population of the continuator state was smaller, its territory, Pakistan, was larger. “But the difference in population size was relatively minor, and the central government was based in and dominated by West Pakistan.” (Opinion, para 68.1.)

8 Para 68.1.

9 Para 68.2. The continuation of governmental institutions is said there to give rise to “a particularly strong presumption of state continuity”.

10 This despite the fact that art 23(1) of the Charter of the United Nations specifically makes “the Union of Soviet Socialist Republics” one of the five permanent members of the Security Council.

11 See n 6 above.

12 Para 65.

13 The authors describe Ireland as a colony until such time as it was incorporated under the Union with Ireland Act 1801 (GB) and the Act of Union 1800 (Ireland) (Opinion, para. 36). Whether or not this

unlike the Irish example, it is not at all clear that the Scottish government has premised (or will premise) its negotiations with the UK on an understanding that the personality of the UK will be continued by the rUK. On the contrary, the Scottish government appears to favour a position that would see the UK cease to exist upon Scottish independence. After all, as the authors of the Opinion conclude, if the rUK were to be considered a continuator state of the UK and Scotland a successor state, Scotland would be required to join the UN<sup>14</sup> and the European Union<sup>15</sup> as a new state and would probably have to accede to the Council of Europe as a new member.<sup>16</sup>

An interpretation which characterises the rUK as the continuator of the UK and Scotland as a successor state is preferred by the UK government for obvious reasons. The rUK would have the stability that comes with continuing to be the holder of the UK's membership in the United Nations (along with its permanent membership in the Security Council) and in various other international and regional organisations. This interpretation is also favoured by the authors of the Opinion. Noting that "the rUK would retain about 92% of the UK's population, more than two-thirds of its territory, and its principal governmental institutions",<sup>17</sup> and invoking the precedent of the separation of most of Ireland (which, they argue, indicates that the UK would survive another comparable loss of territory),<sup>18</sup> the authors conclude that the rUK "would continue to exercise the UK's international rights and obligations [as a continuator state], and that an independent Scotland would be a new state." Such a scenario, they conclude, would be recognised by the international community.<sup>19</sup>

## B. RUK AND SCOTLAND AS NEW STATES: THE UK BECOMING EXTINCT

A second possible outcome considered in the Opinion is that there would be no continuator state for the UK; instead, the rUK and Scotland would both emerge as new states out of the ashes of a dissolved UK. Two examples of cases where there was no continuator state are discussed: the dissolution of Czechoslovakia on 31 December 1992, which led to the formation of the Czech Republic and Slovakia; and the dissolution of the Socialist Federal Republic of Yugoslavia ("SFRY") in the early 1990s, which led to the creation of five, and later six, new states.<sup>20</sup> In each case all

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characterisation of Ireland is generally accepted, it is certainly the case that the history of Scotland's relationship with England was of a different nature. This is discussed in the Opinion at paras 26-32.

14 Para 132.

15 Para 163. The authors observe, however, that it is not "*inconceivable*" for Scotland automatically to be an EU member" if the EU organs or member states were willing to adjust the usual requirements for membership (para 164, emphasis in original).

16 Para 140.

17 Para 69.

18 Ibid.

19 Para 70.

20 Slovenia, Croatia, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia and the Federal Republic of Yugoslavia ("FRY", consisting of the former republics of Serbia and Montenegro). As discussed above, Montenegro seceded from the FRY (which, by that time, had changed its name to Serbia and Montenegro).

newly-emerging states applied for UN membership. Is it plausible then to analogise a divorce between Scotland and England<sup>21</sup> to the break-up of Czechoslovakia or the SFRY and see the division of the matrimonial property (in this case treaty rights and obligations, as well, presumably, as assets and debts) as an endeavour to be undertaken by equals? This would appear to be the approach favoured by the First Minister of Scotland who observed that after independence Scotland and the rUK would inherit “exactly the same international treaty rights and obligations”.<sup>22</sup>

The Opinion gives the possibility of such an outcome little weight, however, finding the two examples to be inapposite in the circumstances of Scottish independence. The situation in Czechoslovakia is distinguished primarily on the basis that whereas the “Velvet Divorce” came about pursuant to an agreement by both parties, UK consent to the creation of two new states is unlikely, if not unimaginable.<sup>23</sup> The authors go on to suggest that were the break-up of Czechoslovakia to have occurred without the consent of both parties, the Czech Republic, which retained 66% of the Czechoslovakia’s population, 62% of its territory and 71% of its economic resources, might well have been characterised as the continuator state.<sup>24</sup> Consent, then, is an important element of a finding that neither newly-emerging entity is a continuator state; conversely, the absence of consent may be a reason for viewing the larger entity as the continuator state.

Of course, the dissolution of the former Yugoslavia was anything but consensual, a fact made manifest by the terrible hostilities that occurred among its former republics in the early 1990s. Following the authors’ analysis of the Czechoslovakia precedent, this absence of consent might appear to suggest that the larger entity (in that case the FRY which constituted the largest part of the territory and population of the SFRY) would be viewed as the continuator state, and the other newly-emerging states as successor states. However, the authors view the absence of consent among the other newly-emerging states to have been an important reason why the international community rejected the FRY’s claim that it was the continuator of the SFRY.<sup>25</sup> Could this be a basis for an argument that if the UK were to split into the rUK and Scotland without both parties consenting to the rUK becoming the continuator state, the international community might be disinclined to accept this? The authors do not see this as a possibility, noting that if an assertion was made by the rUK that it was the continuator of the UK there would be “no obvious reason... for other states or international organisations to dispute its claim”.<sup>26</sup>

21 Though, of course, the UK now comprises more than just Scotland and England.

22 Alex Salmond speaking in an interview with Jon Snow, 26 November 2012, cited in Scotland Analysis (n 1) 35 n 70.

23 The rUK “far from agreeing to the dissolution of the UK... would claim continuity” (para 93). As noted in the body of the report: “it is hard to envisage any scenario whereby the UK Parliament would ever have a mandate from the people of the rest of the UK to dissolve the UK by voting the state out of existence” Scotland Analysis (n 1) para 2.17.

24 Opinion, para 77.

25 Other factors included a reluctance to see the conflict in the former Yugoslavia characterised as a civil war (and any advantage attendant to such a characterisation) and the fact that the FRY did not hold the majority of the predecessor state’s territory and population (Opinion, paras 88-89).

26 Para 93.

### C. SCOTLAND REVERTING TO ITS PRE-1707 STATUS

A third outcome of Scottish independence would be that Scotland and England “reverted” to their status as independent states prior to the 1707 Treaty of Union. This argument, which is attributed to Paul H Scott,<sup>27</sup> is given short shrift by the authors. However, in analysing the argument they modify it: they speak in terms of an argument that the rUK would be the continuator of the UK and Scotland would revert to its pre-1707 status rather than, as Scott proposes, that both the rUK and Scotland would revert to their pre-1707 status, with no continuator state.<sup>28</sup> They consider two examples of a sovereign state retaining (regaining?) its previous personality, despite having become part of another state. In 1958 the states of Syria and Egypt formed the United Arab Republic (“UAR”) and agreed that obligations of both states continued to bind. When, in 1961, Syria withdrew from the UAR it was able to resume its membership in the UN without any need for formal readmission. One view is that Syria “reverted” to its earlier status as the sovereign state of Syria. According to the authors, however, the better view is that the UAR “was never the unitary state it purported to be”<sup>29</sup> but was instead a “loose association whose existence was not inconsistent with the continuing international personality of its constituent units”.<sup>30</sup> Another example was the claim by Estonia, Latvia and Lithuania, after the collapse of the USSR, to revert to their identities before their 1940 annexation by the USSR. While acknowledging that, to an extent these claims were accepted by the EC and the UK, the authors take the view that this was not an example of the “formal legal identity” of the Baltic states being extinguished and then revived; rather they see it as having been “preserved throughout” the period from 1940-1991.

Could these precedents provide a basis for an independent Scotland to argue that its personality never ceased to exist and that its formal legal identity was “preserved throughout” the period from 1707 to the time of independence, whether referred to as genuine “reversion” or something else? Even assuming that the Syria-UAR and the Baltic states examples could be treated as genuine instances of reversion, the authors argue they are inapposite: the first because, though voluntary, it lasted only from 1958-1961; and the second because of the illegal nature of the annexation by the USSR. Certainly those are important distinctions. But might another expert have drawn different lessons from the two examples? For example, might the Baltic case instead be relied upon to show that reversion could occur despite a lengthy association (admittedly the 300 years plus union of Scotland and England is of a different order from the 51 years the Baltic States were part of the USSR)? Might the UAR precedent instead be used to show that the voluntary nature of a merger does not necessarily preclude reversion?

27 See P Scott, *Scotland in Europe: Dialogue with a Sceptical Friend* (1992) 41-42 cited in Opinion, 87 n 78. Presumably the idea would be that in reverting to its pre-1707 self, England would include Wales and Northern Ireland.

28 Para 49. The distinction is an important one: if the rUK is the continuator state of the UK, the scenario is very close to the continuator state/successor state result described at A. above, with the advantages to the rUK attendant to that result.

29 Para 100.3.

30 Ibid.

The authors conclude that, in any event, Scotland would have little to gain from asserting a legal claim of continuity with pre-1707 Scotland. They are unconvinced by Scott's view "that after reverting, Scotland and England 'would both inherit the other treaty rights and obligations of the United Kingdom and that includes membership of the European Community'".<sup>31</sup> After all, they assert, the Baltic States had to apply to the UN, an organisation that did not exist at the time those states were annexed by the Soviets. But surely their position that Scotland has nothing to gain from a reversion/continuity argument only works if instead of treating both Scotland and England as having reverted, Scotland alone is treated as having reverted and England or the rUK is treated as being the continuator of the UK. If, as Scott seems to argue, both states were to revert to their pre-1707 status, then surely each would have an equal claim to the UK's memberships in the various international organisations – none of which existed pre-1707.

The Deputy First Minister, Nicola Sturgeon, reacted to the Opinion with the following statement:<sup>32</sup>

[t]he reality is that there is neither a settled international legal position nor any consistent precedent in these matters. [The] fact is that international precedents – even those cited by the UK government – prove the point that these are matters to be settled, not by law, but by sensible and mature negotiation that reflect the particular circumstances of the countries involved.

While international law assuredly does not provide all of the answers, as the Opinion readily admits, its role is important. Having said that, it is undeniable that much will depend on the nature of the negotiation between the UK and Scotland, regardless of how the rUK and an independent Scotland are characterised in international law.

James Sloan  
University of Glasgow

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## Leveson: The Implications for Scotland's Media

The Leveson Inquiry was the seventh and by far the most significant independent inquiry into the role and regulation of the UK's press in its history. It led to the publication of the Leveson Report<sup>1</sup> in November 2012, whose recommendations

31 Para 113, relying on Scott, *Scotland in Europe* (n 27) 41-42.

32 S Carrell, "David Cameron tries to put the brakes on Alex Salmond" *The Guardian* 11 February 2013, available at <http://www.guardian.co.uk/uk/2013/feb/11/david-cameron-scotland-independence-legal-advice>.

1 The Right Honourable Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press* (2012).

may substantially affect the way in which the press and its traditional sources operate. These changes include a new approach to how sources supply stories, how newspapers satisfy their readers that they are complying with regulatory requirements and a new approach to data protection. Most significant of all, however, is the potential threat of legislation underpinning the regulation of the press.

In order to understand how we reached this stage, and the implications for the future, we need to assess (a) why the inquiry was set up in the first place; and (b) how the press was regulated before (and continues to be, pending any implementations of the Leveson Report).

### A. BACKGROUND

Lord Justice Leveson was asked by the UK Government to inquire into the culture, practice and ethics of the press as a direct result of the phone hacking scandal which had engulfed News International between 2005 and 2007, eventually leading to the discovery that the mobile telephone of murdered teenager Milly Dowler had been hacked in 2011. This particular case caused such revulsion that the UK government decided that action had to be taken to investigate the existing structures and effectiveness of the regulation of the press.

The press should be distinguished from the media, a more generic term, because the press has a different regulatory regime and history in the United Kingdom from its broadcasting cousins. Broadcasters, a more modern breed in comparative terms, are regulated by Ofcom,<sup>2</sup> a government agency set up by the Office of Communications Act 2002.<sup>3</sup> The significance of Ofcom, a hitherto foreign relative of the press, has become all the more relevant in light of Leveson because it is the body which Lord Justice Leveson anticipates will oversee the appointment of a regulatory body for the press.

The press was, and is, self-regulating through the Press Complaints Commission (“PCC”), “which deals with complaints about the editorial content of newspapers and magazines”.<sup>4</sup> The PCC created the Editors’ Code of Practice<sup>5</sup> “which... sets the benchmark for... ethical standards, protecting both the rights of the individual and the public’s right to know. It is the cornerstone of the system of self-regulation to which the industry has made a binding commitment.”<sup>6</sup> The PCC came under fire from a number of sources, largely political, long before the phone hacking scandal ignited, but it was the PCC’s reaction to it which helped create Leveson and has ultimately led to its imminent demise.

<sup>2</sup> Office of Communications.

<sup>3</sup> But receiving its full authority from the Communications Act 2003.

<sup>4</sup> <http://www.pcc.org.uk/>.

<sup>5</sup> <http://www.pcc.org.uk/cop/practice.html>.

<sup>6</sup> Ibid.



## B. LEVESON PROPOSALS, POLITICAL OPTIONS AND SCOTLAND

The main recommendations of the Leveson Report from a legal perspective are: (a) the proposal to underpin regulation with statute, overseen by Ofcom; and (b) changes to the Data Protection Act 1998.

The first of the two proposed changes is the one which has caused significant consternation within the press itself, and has now become a political football. The press objects that any form of statutory connection to press governance would undermine the fundamental principle of press freedom, famously described by Thomas Jefferson in 1816: “Where the press is free and every man able to read, all is safe.” The Press Standards Board of Finance (“Pressbof”)<sup>7</sup> reacted strongly to the proposal:<sup>8</sup>

There is no need to subject the new regulatory body to the statutory regime of Ofcom in order to achieve this. Any form of statutory press control in a free society is fraught with danger, totally impractical and would take far too long to implement.

The envisaged statute, however, is at least two steps removed from the press. What the Leveson Report recommends is the creation of another self-regulatory body governed by an independent board.<sup>9</sup> Behind that, however, Lord Justice Leveson envisages the passing of legislation to create a recognition body which will oversee the independent self-regulatory regime. He anticipates that this will remove what many feel is the “closed shop” mentality of the PCC as well as any risk of political interference.

There is no certainty that these proposals will be implemented. It is likely that the new regulatory body will be set up, but whether regulation becomes welded, however loosely, to the statute book is an entirely different question and is unlikely to be known until after the next UK general election. What is of interest to Scotland is whether Holyrood will legislate separately and, if so, differently from Westminster. Alex Salmond has set up an expert panel comprising leading legal, constitutional and journalistic experts to examine the implications of Leveson in Scotland. Its terms of reference are:<sup>10</sup>

To consider the findings and recommendations made in [the Leveson report] in respect of Press Regulation, and, accepting the main principles on which those recommendations are made, including in particular the need for statutory underpinning of a newly created, genuinely independent and effective system of Self-Regulation, to offer advice and recommendations as to the most appropriate means of achieving such statutory underpinning in Scotland, in the context of —

7 The Press Standards Board of Finance (“Pressbof”) is charged with raising a levy on the newspaper and periodical industries to finance the Press Complaints Commission.

8 Lord Black of Brentwood, chairman of the Press Standards Board of Finance, quoted in *The Guardian* on 29 November 2012, the day the Leveson Report was published. See <http://www.guardian.co.uk/media/2012/nov/29/leveson-report-freedom-slippery-slope>.

9 Leveson Report (n 1) part K ch 7.

10 <http://www.scotland.gov.uk/News/Releases/2012/12/leveson-findings-expert-panel-appointed13122012>.

the Scottish legal system;  
 any other existing provisions in law that relate to publication by the Press in the UK;  
 any developments in Press Regulation elsewhere in the United Kingdom arising out of the Leveson Inquiry;  
 experience in regulation of the press outside of the United Kingdom, that might inform consideration of the recommendations made and the mechanisms suggested in the Part 1 Report of the Leveson Inquiry,  
 and to provide such advice and recommendations to the Scottish Government within 3 months.

The critical aspect of this appointment is the presumption in favour of legislation. Given the Prime Minister's opposition to this aspect of the Leveson Report, it will be interesting to see what part Leveson plays in the independence referendum and whether press regulation will become a battleground for the "yes/no" vote.

### C. EXISTING LEGAL REMEDIES AND THE IMPACT OF LEGISLATION

Press opposition to legislation is fundamental: but to what degree is this position largely symbolic? Can those who argue that legislative foundations are unnecessary truly conclude that existing remedies to the public provide adequate safeguards?

On one view, they can. An individual whose phone has been hacked can report the newspaper to the police, who can prosecute an editor, a proprietor and a journalist.<sup>11</sup> He can also sue for damages.<sup>12</sup> A person whose private or family life has been interfered with now has legal rights in light of the introduction of the European Convention on Human Rights into UK law,<sup>13</sup> and can sue for interdict/injunction (and in England "superinjunction")<sup>14</sup> or damages in light of the landmark cases of *Von Hannover v Germany*<sup>15</sup> and *Campbell v MGN Ltd*.<sup>16</sup> Those whose trials have been prejudiced have legal rights under the Contempt of Court Act 1981,<sup>17</sup> which also provides for penalties in the event of a breach.<sup>18</sup> Those who claim to have been defamed can sue newspapers in the civil courts.<sup>19</sup>

But what about those who simply want to complain about the newspapers? Do they have sufficient redress at present and if not, is legislation necessary to ensure that they do? This is where the battleground is likely to be. In order to provide a meaningful answer, one has to look at how the existing system has operated and its shortcomings. The main criticisms are not that the press has been unwilling to do as instructed by the PCC (usually the publication of a correction), rather that the sanctions available to the PCC—and therefore imposed on the press—have been inadequate.

11 Regulation of Investigatory Powers Act 2000.

12 Cf <http://www.newsint.co.uk/compensationscheme/>.

13 In particular article 8.

14 *CTB v News Group Newspapers Ltd & Anor* [2011] EWHC 1232 (QB).

15 [2004] ECHR 294.

16 [2004] UKHL 22.

17 Sections 2 and 4 in particular.

18 For example, *Scottish Daily Record and Sunday Mail Ltd, Petitioners* 2009 SLT 363.

19 Most notably, *Sheridan v News Group Newspapers Ltd*, 4 July 2006.

The Leveson Report aims to increase the scope and severity of any sanctions. These include:

- The power of an independent board to place corrections and apologies;<sup>20</sup>
- The power of the board to instigate its own investigation;<sup>21</sup>
- The power of the board to impose sanctions including financial ones of up to 1% of turnover with a maximum of one million pounds for serious or systemic breaches of the Code.<sup>22</sup>

Leveson does not recommend that statute should directly govern what newspapers do in the same way as, for example, the Health and Safety at Work Act 1974 governs practices in the workplace. The statute here is a kind of safety net, devised primarily as a foundation stone, presumably to give the public more confidence in the system but also as a fallback should the press refuse to accept a finding against them. The problem is that this is ground-breaking and it overrides the centuries-old principle of a free press.

#### D. DATA PROTECTION

From a lawyer's perspective, arguably the more significant change proposed by the Leveson Report is the amendment to the Data Protection Act 1998<sup>23</sup> in relation to journalistic exemptions. The report advises that, owing to misuse of personal data by certain sections of the tabloid press, such exemptions should be restricted, in that five of the data protection principles will now require to be adhered to by the press and any data processed for journalistic purposes (i.e. outwith the normal parameters) must be *necessary* for publication (as opposed to being *with a view to* publication).<sup>24</sup>

#### E. IMPLICATIONS FOR SCOTLAND

Media law in the UK is relatively uniform. The Contempt of Court Act 1981, the Defamation Act 1996 and the Human Rights Act 1998 all apply across our borders. Defamation cases such as *Charleston & Smith v News Group Newspapers Ltd*<sup>25</sup> and *Reynolds v Times Newspapers*<sup>26</sup> are often quoted in defamation actions in Scotland. Arguably, our approach to contempt is stricter than south of the border, but even that has liberalised to some degree in recent years<sup>27</sup> to bring us closer to our English counterparts.

<sup>20</sup> Leveson Report (n 1) part K ch 7 para 4.37.

<sup>21</sup> Para 4.36.

<sup>22</sup> Para 4.38.

<sup>23</sup> Section 32 of the Act, which exempts the statutory processing of personal data for journalistic, literary or artistic purposes.

<sup>24</sup> Leveson Report (n 1) ch 5 para 2.59.

<sup>25</sup> [1995] 2 All ER 313.

<sup>26</sup> [2001] 2 AC 127.

<sup>27</sup> *Cox and Griffiths, Petitioners* 1998 SLT 1172.

The distinction which Leveson brings, however, is not legal, despite our differing legal systems. Any decision to legislate in Holyrood but not in Westminster will be taken for political reasons, if indeed it is accepted that Scotland has the power to legislate. The Scotland Acts of 1998 and 2012 do not specifically reserve the power of media regulation, although “internet services” and broadcasting remain reserved.<sup>28</sup> The terms of remit given to the expert panel certainly appear to presuppose that legislation in Scotland is favoured by those currently in office. The panel’s role is “to offer advice and recommendations as to the most appropriate means of achieving such statutory underpinning in Scotland”.<sup>29</sup> It will be interesting to see what those recommendations are, as they will almost inevitably involve comparative study with other jurisdictions. On the date of the release of the Leveson Report Alex Salmond was quoted as saying, in support of the proposals:<sup>30</sup>

That puts us very much in the territory of the Press Council of Ireland which I think might well provide a good template for the way forward. Clearly, we will have to be satisfied that this can be done within the necessary context of a free press.

Scotland has already gone its own way (and has arguably led the way) on many legislative issues, including the smoking ban, free personal care for the elderly and tuition fees. It would appear that the Scottish Government is keen to do likewise on media regulation given the terms of remit and the limited time given to the panel to report. Added into the mix is the imminent referendum on independence. The implications for Scotland are, therefore, intriguing.

Laying aside what will be an almost inevitable industry opposition to any legislative connection to media regulation, there are more complicated legal questions for the future: how does this affect the internet platforms of the Scottish press, which are becoming increasingly significant in light of falling circulation of print versions of the product? What of the newspapers’ broadcasting streams, often available online? Both broadcasting and internet services are reserved powers under the Scotland Act. Added to that is the question of newspaper ownership. Some parts of the Scottish press are owned by English companies with Scottish subsidiaries running the titles from north of the border. In the event of a solitary move in Holyrood to legislate, either as a devolved or independent power, assuming that Westminster falls short of creating statute to underpin any regulatory system, the debate, both at local and national level, and indeed at legal, political and commercial level, promises to be intriguing.

*David McKie*  
*University of Glasgow*

<sup>28</sup> Scotland Act 1998 sch 5 part II heads C and K.

<sup>29</sup> <http://www.scotland.gov.uk/News/Releases/2012/12/leveson-findings-expert-panel-appointed13122012>.

<sup>30</sup> <http://www.telegraph.co.uk/news/uknews/leveson-inquiry/9712559/Alex-Salmond-backs-Leveson-report-for-Scottish-press.html>. The Irish system involves an Ombudsman who deals with complaints from the public and is underpinned by statute.

## DNA Collection After Charge: *Lukstins v HM Advocate*

The recent decision of a full appeal bench of the High Court of Justiciary in *Lukstins v HM Advocate*<sup>1</sup> has finally resolved the issue of precisely when a DNA sample may be taken from a person held in police custody. Since 2011, several cases before the High Court have turned on the stage at which police may collect DNA by means of a buccal swab, and, more particularly, whether the charging of an individual precludes subsequent collection of a bodily sample without consent or warrant. Now it is clear that DNA samples may be taken after the person in custody has been charged.

### A. COLLECTING DNA IN SCOTLAND

Various provisions in the Criminal Procedure (Scotland) Act 1995 (henceforth "the 1995 Act") govern the collection and retention of physical data from suspects and crime scenes.<sup>2</sup> According to section 18 of the 1995 Act a constable may take samples and prints from a person who has been arrested and is in custody or is detained under section 14 of the Act.<sup>3</sup> A constable, or a police custody and security officer at the constable's direction, is also permitted under section 18(6A) to take a swab of saliva or other material from the inside of the person's mouth.<sup>4</sup> A more onerous process applies to personally intrusive samples and swabs: inspector approval is required when the sample constitutes hair other than pubic hair, a sample of nail or material from under a nail, or a sample of blood or bodily fluid from an external part of the body.<sup>5</sup>

### B. CHARGE AND DNA COLLECTION IN THE HIGH COURT: *HM ADVOCATE V COWIE*

In 2011 two conflicting judgments were handed down by single judges as to whether section 18(6A) of the 1995 Act applied to a person in police custody who had been charged. In the unreported case of *Dimmock v HM Advocate*<sup>6</sup> Lady Smith stated *obiter* that the provision did not apply to charged persons so that unless a warrant was to be obtained samples needed to be taken prior to charging. Subsequently, and

1 [2012] HCJAC 146, 2013 SLT 11.

2 For consideration of the latter see L Campbell, "The Scottish DNA Database and the Criminal Justice and Licensing (Scotland) Bill" (2010) 14 EdinLR 290.

3 Section 14 permits detention and questioning for the purposes of a criminal investigation where a constable has reasonable grounds for suspecting that a person has committed or is committing an offence punishable by imprisonment.

4 As inserted by s 55 of the Criminal Justice (Scotland) Act 2003.

5 s 18(6) of the 1995 Act.

6 16 March 2011.

contrary to Lady Smith's view, in *HM Advocate v Lukstins*<sup>7</sup> Lady Stacey held that section 18 permitted the taking of samples from a charged person. She noted that while the law is "jealous" of the rights of a charged person, in particular precluding the taking of a statement after charge unless it is voluntary, there is a distinction between on the one hand being asked and answering questions when in police custody and, on the other, the collection of evidence through taking a sample from a person lawfully in police custody.<sup>8</sup>

The High Court in *HM Advocate v Cowie*,<sup>9</sup> sitting with Lord Clarke, Lady Clark of Calton and Lord Wheatley, declined to follow Lady Stacey in *Lukstins*. Here the respondent had been detained under section 14 of the 1995 Act and then charged, after which a DNA sample was taken; she had never been arrested. At first instance, the sheriff sustained an objection by the respondent that this DNA evidence was inadmissible as it was taken after she had been charged and therefore section 18(6)(A) did not apply. In the Crown's unsuccessful appeal,<sup>10</sup> the High Court stated that the question was one of statutory construction.<sup>11</sup> The absence of any reference in the relevant provisions of the 1995 Act to a person who has been charged was deemed to be "significant"<sup>12</sup> and the court stated that very clear statutory language would have been required for the provisions to cover such people.<sup>13</sup> The court's caution derived from the distinct status of a charged person compared to someone who has been arrested and/or detained: in the former instance the state goes beyond expressing suspicion to accusing someone of having committed an offence.<sup>14</sup> The court also views mouth swabs as being more invasive than fingerprints and handwriting samples.<sup>15</sup> Moreover, the court held that the rule against self-incrimination would be breached by police officers requiring such a person to provide a DNA sample by way of a swab without warrant or consent.<sup>16</sup> Although the Advocate Depute relied on *Jalloh v Germany*<sup>17</sup> as authority for the proposition that the rule against self-incrimination covers the obtaining of statements but not samples from persons who have been charged,<sup>18</sup> the court emphasised that its conclusions were reached "without needing to place any reliance on Strasbourg jurisprudence" and that "the rights of the accused are to be found in our own domestic law".<sup>19</sup>

The decision in *Cowie* addressed a number of issues in an unsatisfactory manner. First, it presented a limited analysis of the status of a charged person compared with someone who has been arrested or detained. As the court noted, the Criminal Justice

7 [2011] HCJAC 69.

8 Para 15.

9 [2011] HCJAC 111.

10 Under s 74 of the 1995 Act.

11 *Cowie* at para 13.

12 Para 13.

13 Para 15.

14 Para 14.

15 Para 15.

16 Para 14.

17 (2007) 44 EHRR 32 at para 102.

18 *Cowie* at para 6.

19 Para 16.

(Scotland) Act 1980 constructed the notion of a detained, but non-arrested, person for the first time in Scotland,<sup>20</sup> and this scheme of statutory detention is now provided for by the 1995 Act. Cowie was not arrested under the common law, but rather was in detention under section 14 of the 1995 Act, and regrettably the High Court did not examine how subsequent charge would effectively “end” her detention and thereby prevent further DNA from being collected under the statutory scheme. Furthermore, the brief account of self-incrimination fails to consider domestic and European cases that indicate unequivocally that the principle does not apply in the context of material or data independent of the will of the person.<sup>21</sup> Indeed, no Scottish case law is cited in the judgment to support the finding regarding self-incrimination.

One observation of the High Court may, however, find sympathy. The court noted that collecting DNA evidence through a mouth swab involves some degree of invasion of the person’s body. One may intuitively support this comment, insofar as it seems to create an interim category of samples which are more invasive of bodily integrity than the taking of a fingerprint but which do not equate to a blood sample. Indeed the introduction of these measures had raised significant questions in relation to bodily integrity and has redefined what we conceive of as “intimate” or “invasive”.<sup>22</sup> Nonetheless, such categorisation of buccal swabs is not evident in the statutory scheme that permits collection without warrant by a police officer. The court’s finding may have been influenced by concern about the invasion involved in taking the sample and a desire to limit police powers. However, this overlooks the meaning of arrest and detention in Scotland and the statutory scheme in place.

### C. REMEDYING COWIE?

The decision in *Cowie* posed potentially grave problems for pending cases, given the possible inadmissibility of numerous pieces of DNA evidence collected in accordance with the previous interpretation of the law. Thus *Cowie* prompted numerous applications for warrants seeking permission to collect new DNA samples in cases where there was a concern that the original samples had been taken unlawfully, though in accordance with the statutory procedure as once construed. Some warrants were granted in the interests of justice, on the grounds that the initial sampling was done in good faith and the practice was unquestioned at that time.<sup>23</sup> However, in *HM Advocate v Edwards*, for example, Lord Turnbull declined to grant warrants, characterising the actions of the police as “routine conduct based upon what seems

20 Para 14. At common law, “no person can be lawfully detained except after a charge has been made against him” (*Chalmers v HM Advocate* 1954 JC 66 at 78 per Lord Justice General Cooper; see also *HM Advocate v Aitken* 1926 JC 83).

21 See *Adair v McGarry* 1933 JC 72; *HM Advocate v P* 2012 SC (UKSC) 108.

22 For consideration of equivalent English measures see C Walker and I Cram, “DNA profiling and the law” [1990] Crim LR 479.

23 See *HM Advocate v Apolajohanaangels*, 4 November 2011; *HM Advocate v Paterson*, 16 November 2011; *HM Advocate v Kazeem Kadiri*, 6 December 2011 (all three decisions are referred to in *MacLean v Dunn* 2012 SLT 1024, [2012] HCJAC 34 at para 10).

to have been a systemic failure to appreciate the important change in status brought about by the act of charging the detainee”.<sup>24</sup>

Then, in *MacLean v Dunn*<sup>25</sup> the High Court considered the taking of a DNA sample from an accused person who had been arrested and charged with attempted murder and whose DNA matched that found at the crime scene. The sample had been taken under a procedure that was considered to be unlawful after *Cowie* and, as a result, the Crown petitioned the sheriff for a warrant to allow the taking of a fresh sample. The petition was granted. The complainer lodged a bill seeking suspension of the warrant, relying on *Cowie* and *Edwards*, but this was refused.

The court did not approve of Lord Turnbull’s characterisation of the police, but said that at worst they were guilty of an understandable error, shared by many practitioners and some High Court judges, about proper statutory construction.<sup>26</sup> The court stated that while it was appropriate for the sheriff to consider *Cowie*, it did not alter his discretion to issue a warrant and it approved of the granting of warrants in other cases.<sup>27</sup> It expressed its “reservations about the soundness of their answer [in *Cowie*] to the question of construction”, but felt it unnecessary to remit the appeal to a fuller bench because the issue in *Cowie* had no direct bearing on the present case. Nonetheless, the court noted that had it been necessary to do so for the purposes of this appeal, it would have questioned a number of matters: namely, whether the taking of samples from a detained or arrested suspect raised any issue of self-incrimination; whether there were any practical reasons to construe section 18 so as to create technical distinctions in relation to people in custody; and whether charge should prevent the exercise of police powers without explicit provision.<sup>28</sup>

## D. THE DECISION IN *LUKSTINS V HM ADVOCATE*

*Cowie* was overruled by a full bench of five judges in *Lukstins v HM Advocate*.<sup>29</sup> Lukstins was convicted of rape after failing in his defence submission concerning the admissibility of DNA evidence.<sup>30</sup> He appealed, arguing that the evidence provided by his DNA sample ought to have been excluded as it had been taken after he had been charged and in contravention of *Cowie*.

In refusing the appeal, the High Court held that section 18(6A) was “clear and unambiguous” and there was no basis for reading into it a limitation that the police power to take a mouth swab from an arrested person who was in

<sup>24</sup> *HM Advocate v Edwards* [2012] HCJ 9 at para 38.

<sup>25</sup> *MacLean v Dunn* 2012 SLT 1024, [2012] HCJAC 34.

<sup>26</sup> Para 17. It also commented on Lord Turnbull’s grant of such a warrant in *HM Advocate v Kazeem Kadiri*, 6 December 2011.

<sup>27</sup> Paras 10 and 13.

<sup>28</sup> Para 20.

<sup>29</sup> *Lukstins v HM Advocate* [2012] HCJAC 146, 2013 SLT 11.

<sup>30</sup> *HM Advocate v Lukstins* [2011] HCJAC 69, 2012 SLT 167.



custody, or a detained person, ceased once the person was charged.<sup>31</sup> As well as the “ordinary and plain meaning” of the words, Parliamentary intention was deemed to be the same.<sup>32</sup> None of the statutory reforms relating to detention and sampling referred to the charging of a suspect as a termination point, and this was seen to cohere with the position at common law where arrest is not distinct from charge.<sup>33</sup>

The court was critical of an interpretation of charge in Scots law as a point at which the investigative duties of the authorities cease.<sup>34</sup> Under common law the timing of a police charge does not affect powers of search,<sup>35</sup> and the collection of fingerprints after charge is permitted.<sup>36</sup> To Lord Carloway, the legislation categorises buccal swabbing as “non-invasive” and as a procedure “so mild” as to be capable of being carried out by any police officer on a person properly arrested and in custody or detained,<sup>37</sup> so that rules equivalent to those for fingerprinting applied. Moreover, though *Chalmers v HM Advocate*<sup>38</sup> indicated that once the accused had been arrested and charged he was under the protection of the court and could not be questioned further, *Johnston v HM Advocate*<sup>39</sup> permitted questioning to continue after charge and concluded that any answers would be admissible subject to the general fairness test. Indeed, Lord Doherty noted that while brief reference was made to *Johnston* to support the proposition that a person was entitled to greater protection from the court after charge than after arrest, the court was not addressed fully on these matters and so he reserved opinion.<sup>40</sup>

While case law may once have suggested some demarcation between arrest and charge when it comes to questioning, this seems to have been overtaken by *Johnston* and is not applicable in the context of search. Moreover, the full bench in *Lukstins* was right to dismiss the equation of self-incriminating statements with real evidence,<sup>41</sup> a conclusion clearly supported by Scottish, English and ECHR authorities.<sup>42</sup>

## E. ANALYSIS

This decision is to be welcomed for clarifying the construction of section 18 and its scope in relation to DNA collection, settling conclusively this (over-)complicated area of Scots criminal procedure. Even so, police practice of waiting until after charge before collecting a DNA sample raises a question about the weight of evidence on

31 *Lukstins* at para 22 per Lord Carloway; para 47 per Lord Doherty.

32 Para 23 ff per Lord Carloway; para 55 per Lord Doherty.

33 Para 37.

34 Para 38 per Lord Carloway; para 53 per Lord Doherty

35 See *Forrester v HM Advocate* 1952 JC 2.

36 See *Adair v McGarry* 1933 JC 72; *Namyslak v HM Advocate* 1995 SLT 528.

37 *Lukstins* at para 37.

38 1954 JC 66.

39 1993 JC 187.

40 *Lukstins* at para 69.

41 See paras 33 and 39 per Lord Carloway; para 66ff per Lord Doherty.

42 See n 21 above.

which that charge is based. DNA is presented as a critical dimension of criminal investigations but, as these cases illustrate, usually it constitutes relevant evidence that may be valuable but is not decisive, and by itself means little. Therefore, while staying the collection of DNA until after charge is now legal such practice indicates that DNA evidence merely substantiates other evidence on which the charge is predicated rather than forming the key basis for charge, as is sometimes presumed. This is not to criticise the timing of swabs, rather to observe that in many cases there is already sufficient evidence to charge without the DNA sample. This brings into sharp relief the disproportionate focus on DNA as a tool of criminal investigation.

*Lukstins* is a fortunate resolution for effective policing in Scotland, re-affirming the status quo whereby DNA samples may be taken from anyone arrested or detained, regardless of whether or not a charge has been made. Though the clarity it brings is to be lauded, statements from the High Court in previous cases outlined here demonstrate judicial concern about the invasive nature of the sampling, equivocation about the differentiation between real and oral evidence in the context of self-incrimination, and ultimately the extent of police powers in collecting genetic material from charged persons. While these are valid concerns, they were not central to the decision in *Lukstins*, which really stemmed from a misunderstanding regarding Scots criminal procedure. The time for debating such details has passed given that the statutory scheme in place since 2003 essentially equates mouth swabs with fingerprints and permits a similarly expansive scheme of collection. Now DNA may be collected from persons in lawful custody regardless of whether or not they have been charged.

*Lukstins* remedied an ambiguity in statutory construction to ensure the admissibility of DNA evidence and the continuation of standard police practice. Nevertheless, it appears that this analysis will soon be rendered redundant given the Carloway Review's proposal to replace section 14 detention with arrest on reasonable suspicion; to abolish the need for arrest or detention to be accompanied by a charge; and to permit questioning and other investigative procedures to be carried out notwithstanding the suspect's arrest and detention.<sup>43</sup> The Scottish government has pledged to introduce "simplified systems for arrest and questioning of suspects".<sup>44</sup> It is hoped that any new scheme will articulate unambiguously how and when DNA sampling may take place.

*Dr Liz Campbell*  
*University of Edinburgh*

*(The author wishes to express her thanks to Professor Gerry Maher for valuable comments on a draft of this article.)*

<sup>43</sup> Carloway Review, *Report and Recommendations* (2011) para 5.1.36.

<sup>44</sup> Scottish Government, *Working for Scotland: The Government's Programme for Scotland 2012-13* (2012) ch 8 para 20.

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## A Supreme Case of Incompetence: *Ruddy v Chief Constable of Strathclyde Police*

In September 2004 Mr Ruddy (“the appellant”) was arrested in Tayside pursuant to a warrant and, after having been held in custody there, transported from Perth to Glasgow by officers from Strathclyde Police. He claims that during the journey he was unjustifiably threatened, abused and assaulted. In November 2004 he sought legal aid to permit him to raise proceedings for damages. Notification of the request for legal aid was treated by the force as intimation of a complaint. Strathclyde Police remitted the matter to its complaints and discipline branch which reported receipt of a complaint to the procurator fiscal. Over the next few months both the fiscal and the complaints and discipline branch took steps to investigate the complaint. In due course the fiscal concluded that there were no grounds to prosecute any police officers, and the complaints and discipline branch decided not to commence misconduct proceedings.

### A. PROCEDURAL HISTORY

The appellant commenced legal proceedings in Glasgow Sheriff Court against the chief constable and the Lord Advocate. He contended that the chief constable was vicariously liable for the actions of his officers and claimed £10,000 damages in respect of both a common law assault and a breach of his right under article 3 of the European Convention on Human Rights not to be subjected to degrading treatment.<sup>1</sup> He also made a separate article 3 claim for just satisfaction relative to a breach of his right to an effective investigation into his complaint. This crave was directed (initially jointly and severally, but after amendment severally only) against the chief constable and Lord Advocate.

Neither defender took any issue with the competence of the proceedings, but lodged pleas to the relevancy of certain averments. The sheriff and, on appeal, the sheriff principal sustained those pleas in so far as they were directed towards the “effective investigation” head of claim, which was excluded from probation. An appeal was taken to the Inner House<sup>2</sup> where an Extra Division<sup>3</sup> declined to hear the argument on relevancy and instead asked to be addressed upon what it perceived to be “fundamental questions of competency”.<sup>4</sup> The court was concerned with some or all of the article 3 claims. It initially noted that the allegation of a failure to carry out an

1 Under s 8(3) of the Human Rights Act 1998.

2 *Ruddy v Chief Constable of Strathclyde Police* [2011] CSIH 16, 2011 SC 527.

3 Comprising Lady Paton, Lord Clarke and Lord Abernethy. The opinion of the court was delivered by Lord Clarke.

4 Para 8.

effective investigation inevitably involved a review of the investigatory proceedings.<sup>5</sup> Such an “attack on the quality of the actual investigations that were undertaken in this case because of alleged defects in the procedure adopted” raised “important questions of administrative law which normally at least would require to be made the subject of judicial review proceedings in the Court of Session”.<sup>6</sup> In a later passage, however, the court appeared to take the view that *both* article 3 claims were susceptible to the same criticism, when it stated that “the claims, in this case, in respect of alleged breaches of the appellant’s human rights would require to be brought by way of judicial review”.<sup>7</sup> It is not entirely clear if the court truly intended to convert an argument initially directed towards one of the article 3 claims into one which embraced them both, or if it simply expressed itself more broadly than intended. This point will be returned to, below.

The Extra Division also criticised the “omnibus” approach which had been taken to the pleading of the case, which had transformed “a straightforward claim for damages for assault” into a unnecessarily complicated process in which “one action is being brought against two separate defenders with three distinctive juristic bases of claim being made”.<sup>8</sup> Lord Clarke thought this contrary to the forms of action and rules of procedure necessary “for the obvious good purpose of . . . keeping good order in litigation”.<sup>9</sup> Omnibus pleadings of this sort were a recipe for “litigation bedlam”<sup>10</sup> and contravened the well-established principle that:<sup>11</sup>

one pursuer cannot sue two or three defenders for separate causes of action and put into his summons a conclusion for a lump sum, and then by means of putting in the words “jointly and severally, or severally” ask the court to split up this lump sum and give a several decree for what the court thinks proper.

Lord Clarke was plainly disappointed that none of the parties seemed to be alive to the fundamental problems the court had detected, and expressed his regret at the “very considerable public expense” which must have been incurred while relevancy was being disputed in the sheriff court.<sup>12</sup> He expressed the view that the action fell to be dismissed as incompetent but stopped short of making a formal determination to that effect, recognising that the court’s opinion had gone into matters “further, and in greater detail, than was the case when the . . . hearing took place”.<sup>13</sup> The case was therefore put out By Order to provide an opportunity for the parties to make further representations before an interlocutor was pronounced. No such opportunity was sought. Instead, an appeal was taken to the Supreme Court.

<sup>5</sup> Para 6.

<sup>6</sup> *Ibid.*

<sup>7</sup> Para 14.

<sup>8</sup> Para 5.

<sup>9</sup> Para 13.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ellerman Lines Ltd v Clyde Navigation Trs* 1909 SC 690 at 691-692 per Lord President Dunedin.

<sup>12</sup> *Ruddy* at para 16.

<sup>13</sup> *Ibid.*

## B. THE SUPREME COURT DECISION

Lord Hope issued the leading judgment with which the other Justices agreed.<sup>14</sup> He commenced his discussion of the case by quoting the well-known dictum of Lord Chancellor Cairns in *Cowan and Sons v Duke of Buccleuch*:<sup>15</sup>

In matters of procedure and practice... and above all, where the Judges of the Court below are unanimous... the uniform practice of your Lordships' House has been not to differ from that opinion unless your Lordships are perfectly satisfied that it is founded upon erroneous principles.

Lord Hope considered that this statement applied to the Supreme Court just as it had to the House of Lords but noted with regret that he was "entirely satisfied" this high threshold had been met.<sup>16</sup>

Lord Hope observed that the Inner House's approach was undermined by the erroneous assumption that the appellant was seeking an exercise of the court's supervisory jurisdiction:<sup>17</sup>

in neither of the article 3 craves is the appellant asking for the review or setting aside of any decision of the Chief Constable or Lord Advocate. He is not asking for the court to control their actions in that way at all... What he seeks is just satisfaction for the fact that, on his averments, his article 3 Convention rights have been breached. The essence of his claim is simply one of damages.

With the Inner House's objection to competency of the article 3 craves dispensed with, Lord Hope turned his attention to the objection based upon the form of the action. After careful review of the authorities<sup>18</sup> he accepted that it is indeed a well-established principle of Scots civil practice that two or more defenders are not to be found liable in a single lump sum. However that was not, as a matter of fact, what the appellant had craved. There were two craves by which the appellant sought an award of damages. The first, based on averments of common law assault and/or the article 3 right not to be subjected to degrading treatment, was directed against the chief constable only. The second, based on the separate article 3 ground of ineffective investigation of the complaint, was directed towards both the chief constable and the Lord Advocate. Lord Hope noted that these craves described separate wrongs, committed at different times by different people. However, the appellant had not pled that he was entitled to a decree for the defenders to be found liable in a single lump sum for these separate wrongs. Thus the Extra Division's reliance upon *Ellerman Lines*<sup>19</sup> was "misconceived".<sup>20</sup>

14 [2012] UKSC 57, 2013 SLT 119.

15 *Cowan and Sons v Duke of Buccleuch* (1876) 4 R (HL) 14 at 16.

16 *Ruddy* [2012] UKSC 57 at para 13. Even before the Supreme Court considered the appeal in *Ruddy* serious doubt had been cast on Lord Clarke's analysis: see *Docherty v Scottish Ministers* [2011] CSIH 58, 2012 SC 150 at para 20 per Lord President Hamilton.

17 *Ruddy* [2012] UKSC 57 at para 15.

18 Paras 22-24.

19 See n 11.

20 *Ruddy* [2012] UKSC 57 at para 25.

The Inner House's objection to an "omnibus approach" and the resultant threat of "litigation bedlam" was also considered to be unpersuasive. Lord Hope acknowledged that Lord Clarke was "right to refer... to the need to avoid undue complexity and to keep good order in litigation" and that it was "possible to imagine cases where such an objection could properly be taken".<sup>21</sup> He noted, however, that there were several occasions when the court had permitted actions to proceed against two defenders on separate grounds when considerations of convenience favoured letting the case proceed to proof as a whole.<sup>22</sup> In reality the present case was not complex and since there was substantial commonality in the factual averments that would have to be proved to establish either crave, "good order in litigation" favoured both claims being heard together, not kept apart.<sup>23</sup> Thus the last of the Extra Division's objections to the competency of the action was dispensed with and the case was returned to the Inner House to consider the appeal against the sheriff principal's decision on relevancy.

### C. ANALYSIS

Lord Hope's judgment is lucid, incisive and entirely persuasive but its underlying message is an unhappy one. In *Ruddy*, the Extra Division fell into very serious error as to both the substantive and adjectival law of Scotland, errors which seem all the more acute when one considers the rather pointed nature of parts of Lord Clarke's judgment. Raising the spectre of "litigation bedlam" in a case involving only two defenders and three claims seems particularly inappropriate. Of course, litigation bedlam *can* occur and an action can descend into a "multi-party Donnybrook"<sup>24</sup> unless appropriate steps are taken to control its scope. However, to dismiss as incompetent a case which was of no real complexity because bedlam could follow if an omnibus approach were taken in more complicated cases is to significantly overreact to a potential problem. The appropriate response is not to launch a pre-emptive strike but to wait for the truly complex case to arise, and then to dismiss it. It is hard to understand why the Extra Division thought otherwise.

Not all of the Division's errors are so puzzling. Delictual liability for the actings of public authorities is an avowedly difficult area.<sup>25</sup> Lord Clarke was correct to identify this as the point where administrative and private law converge,<sup>26</sup> even if he fell into error when trying to navigate the difficult waters that have formed at the confluence. It is submitted that Lord Hope was right to note that the article 3 argument directed towards the lack of an effective investigation is not a judicial review masquerading as an action for damages. However, given that it is a claim directed towards a decision not to prosecute or commence misconduct proceedings, it is easy to see how it could have been mis-identified as such: it superficially resembles a review, but it is not

<sup>21</sup> Para 28.

<sup>22</sup> Paras 29-32.

<sup>23</sup> Para 33.

<sup>24</sup> *Williams v National Surety Corporation et al* 257 F.2d 771, 773 (5<sup>th</sup> Cir 1958) (Brown, J).

<sup>25</sup> *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, [2004] 1 WLR 1057 at para 2 per Lord Steyn.

<sup>26</sup> G Gordon, "Liability of public authorities", in J Thomson (ed), *Delict* (2007-) paras 20.01-20.02.

one. Less understandable, however, was the Inner House's apparent belief that *any* challenge in respect of alleged breaches of the appellant's human rights should be proceeded with by way of judicial review. If that truly is what the judges of the Extra Division believed – and there is room for doubt on this – the error was a striking one. As Lord Hope noted, there are a number of cases where human rights arguments have been raised by way of damages actions, sometimes on their own and sometimes pled alongside long-established private law cases.<sup>27</sup> This is not surprising. As Lord Hope has observed extra-judicially, “the Human Rights Act 1998 was designed to create a parallel system for bringing rights home, not to change the common law so that it too could accommodate them”.<sup>28</sup> The co-existence, from time to time, of alternative remedies based on the same factual grounds is a logical consequence of this structure.

Perhaps the most troubling aspect of the Inner House's decision in *Ruddy* was the apparent criticism of the appellant (and/or his legal representatives) for choosing to complicate a simple police assault case by introducing a human rights dimension. The Human Rights Act 1998 is not universally loved. However it is law, and it is no more the judge's job to tell a pursuer to simplify his case by foregoing his human rights-based claim than it would be the judge's business to tell a pursuer that she should confine herself to a case in negligence and refrain from advancing a perfectly valid case of breach of statutory duty. It is certainly not the case that, in an action based upon one set of factual circumstances where both human rights and common law cases are pled, the human rights grounds will invariably be a fifth wheel on the wagon. There are good grounds for believing, for instance, that (in some very particular circumstances) an article 2 right to life claim may be taken in respect of police failures to protect a pursuer from serious assault,<sup>29</sup> even though the rule in *Hill v Chief Constable of West Yorkshire*<sup>30</sup> would preclude recovery under common law. And in *Docherty v Scottish Ministers*<sup>31</sup> it was held that an article 3 “slopping out” case was not a claim of reparation and was therefore not time-barred, as a claim for reparation would have been.<sup>32</sup> While it is not yet clear if the human rights dimension will make a material difference to the outcome in *Ruddy*, there certainly can be situations where the pleading of a human rights case will be the difference between success and failure.

Greg Gordon  
University of Aberdeen

27 *Ruddy* [2012] UKSC 57 at para 20. Lord Hope refers to *Mitchell v Glasgow City Council* [2009] UKHL 11, 2009 SC (HL) 21; *Docherty v Scottish Ministers* [2011] CSIH 58, 2012 SC 150; and *C v Advocate General for Scotland* [2011] CSOH 124, 2012 SLT 103. Reference could also be made to, for instance, the English case of *Van Colle v Chief Constable of Hertfordshire* [2008] UKHL 50, [2009] 1 AC 225.

28 Lord Hope, “The judges’ dilemma” (2009) 58 ICLQ 753 at 764.

29 Gordon (n 26) paras 20.54–20.57.

30 [1989] AC 53. See also *Brooks v Commissioner of Police for the Metropolis* [2005] 1 WLR 1495.

31 [2011] CSIH 58, 2012 SC 150.

32 Equally, the *common law* claim will not always be superfluous. The discretionary nature of the award of damages made in just satisfaction of a breach of human rights means that it may in some circumstances be less valuable than a damages claim at common law, see Gordon (n 26) para 20.29.

## Warrandice and Extra-Judicial Eviction

### A. EVICTION BY NON-OWNERS

Few conveyancing transactions go as badly wrong as that in *Morris v Rae*.<sup>1</sup> Back in August 2004 Ransom Developments Ltd concluded missives for the purchase of a development plot at 152 Dalmellington Drive, Ayr at a price of £140,000. The seller was Anna Maria Rae. A disposition was granted in the usual way and an application made for first registration in the Land Register. Ten months later the application was rejected by the Keeper. Mrs Rae, it appeared, had no title to a significant part of the land disposed, including the means of access from the public road. Further title investigation suggested that the owner was actually a company called James Craig Ltd. Ransom opened negotiations with Craig but matters broke down quickly and on 18 November 2005 Craig's solicitors wrote a formal letter asserting Craig's title and threatening to enforce it against Ransom. Eventually, however, the parties came to terms. Ransom was to pay £70,000; in exchange Craig would grant a disposition in respect of the missing strip. Settlement of this transaction took place on 9 March 2006. This second disposition, however, turned out to be as worthless as the first. It is true that Craig had once been owner of the strip; but in 1991 Craig had included the strip by mistake in a disposition of other land to a John Stevenson Lynch. A third disposition, from Mr Lynch, would now be required.<sup>2</sup> Fortunately, Mr Lynch was willing to part with the strip without payment. Nonetheless, Ransom was out of pocket to the extent of the £70,000 paid to Craig, and sought to recover that sum from Mrs Rae under the warrandice clause of the (first) disposition.<sup>3</sup>

Warrandice is commonly thought of as a guarantee of title, and so in broad terms it is. But, in a rule which derives from Roman law, was prominent in the *ius commune*, and has been retained in the modern law of many countries, no claim can arise unless the buyer has been "evicted".<sup>4</sup> For this two things are needed.<sup>5</sup> First, a person with better title to the property must actively assert that title; and secondly, either the title must be judicially declared ("judicial eviction") or, as Stair puts it, the title must rest on a ground so "unquestionable" that litigation would be a pointless formality ("extra-judicial eviction").<sup>6</sup> The difficulty in *Morris v Rae*, a case about extra-judicial eviction, was the mismatch between challenge and title; for the active assertor (Craig) had no title, and the person who had a title (Mr Lynch) had not engaged in active assertion.

1 [2011] CSIH 30, 2011 SC 654 rev [2012] UKSC 50, 2013 SLT 88. All references are to the case in the Supreme Court unless otherwise stated.

2 In fact a fourth disposition may yet be necessary because it seems that Mr Lynch may have disposed the strip in 2002 to trustees: see para 10.

3 The action was actually raised by an assignee, Robert Morris, Ransom having gone into liquidation on 27 September 2007.

4 The history is traced in R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 293-304.

5 K G C Reid, *The Law of Property in Scotland* (1996) para 707.

6 Stair, *Inst* 2.3.46.



For a majority of the Extra Division, this was fatal to any claim in warrandice. Craig was not the owner when, on 18 November 2005, it asserted its title against Ransom by formal letter; and in the absence of ownership Craig was not in a position to evict. In a judgment given in 2011 the Division dismissed the action.<sup>7</sup> The pursuer appealed to the Supreme Court.

In reaching its view, the Extra Division had relied on the decision of the First Division in *Clark v Lindale Homes*<sup>8</sup> including two passages<sup>9</sup> which referred to eviction by “the competing title-holder” or “the party with the competing title”.<sup>10</sup> But as the Supreme Court now pointed out, these passages had to be read in context and were in any event *obiter dicta*.<sup>11</sup> *Clark* had not been about the quality of the challenger’s title; nor indeed was any other previous case. And no help, on that specific point, could be found in the institutional writers, in Mungo Brown’s venerable *Treatise on the Law of Sale* (1821), or even in Robert Pothier’s *Traité du Contrat de Vente* (1762), which had been influential in the treatment of warrandice by Brown and, later, by George Joseph Bell.<sup>12</sup> The question was thus an open one.<sup>13</sup>

The objection made to Craig’s title was that Craig had, at best, a personal right to become owner.<sup>14</sup> Yet a real right, the Supreme Court said, was not an indispensable basis for eviction. If Ransom’s title had been voidable rather than void, eviction would have been procured by a reduction at the instance of a party whose right to reduce was necessarily only personal.<sup>15</sup> And while reduction was a special case, or at least a different case from that presently under consideration,<sup>16</sup> it showed that it was wrong to view matters too rigidly. As the authorities indicated, the essential requirement was that the challenger was “in a position to make good his challenge”<sup>17</sup> by means of an “unquestionable” title.<sup>18</sup> The threat, if it did not proceed to concluded litigation, must be shown to be “capable of being made effective”.<sup>19</sup> But the precise way in which that might be done must be worked out “according to the circumstances of each case”,<sup>20</sup> and it was perfectly sufficient if, as in the present case, the challenger was “in a position to compel the party in whom the real right is vested to transfer the title to him”.<sup>21</sup> Even if that was wrong, and a personal right was insufficient title, then,

7 [2011] CSIH 30, 2011 SC 654. For a discussion, see K G C Reid and G L Gretton, *Conveyancing 2011* (2012) 146-150.

8 1994 SC 210.

9 Respectively at 224 per Lord Morison and 220 per Lord President Hope.

10 2011 SC 654 at paras 9 and 10 per Lord Clarke.

11 2013 SLT 88 at para 24 per Lord Hope, para 39 per Lord Reed.

12 See Bell, *Prin* §§ 121-126.

13 Para 3 per Lord Hope.

14 Para 18 per Lord Hope, para 39 per Lord Reed.

15 Para 23 per Lord Hope, para 48 per Lord Reed.

16 Para 49 per Lord Reed.

17 Para 24 per Lord Hope.

18 Para 45 per Lord Reed.

19 Para 27 per Lord Hope.

20 Para 24 per Lord Hope.

21 Para 27 per Lord Hope. See also para 56 per Lord Reed (“an unqualified entitlement, exercisable immediately, to demand the transfer of the title currently vested in another person”).

as Lord Reed noted, an absence of title at the outset of the warrandice action might perhaps be cured by its acquisition as the litigation progressed.<sup>22</sup>

Underpinning, indeed determining, these technical arguments were questions of policy. The justification for extra-judicial eviction was, Lord Reed thought, “essentially practical”, reflecting “the undesirability of pointless delay and expense, and pointless litigation, where eviction is ultimately inevitable”.<sup>23</sup> For the purchaser to defend an indefensible title “would be a waste of time and money”.<sup>24</sup> A title, however, is no less indefensible just because the challenger has yet to take the necessary steps to complete his own title.<sup>25</sup> “[N]o useful purpose will be served by requiring the purchaser to resist the threat” until those steps have been taken. “[T]he only practical result of such a requirement would be pointless delay in the resolution of the purchaser’s difficulties.”<sup>26</sup>

The Supreme Court allowed the appeal and remitted the case to the Outer House for the hearing of a proof before answer.

## B. EVALUATION

The idea that eviction need not always be judicial can be traced back as far as Stair’s statement that “warrandice will take effect where there is an unquestionable ground of distress, though the fiar transacted voluntarily to prevent the distress”.<sup>27</sup> Yet, old as it is, this idea has lain virtually undeveloped until modern times. It was not until *Watson v Swift & Co’s Judicial Factor*,<sup>28</sup> decided in 1986, that a person was held to be evicted by settling a court action to which there was no stateable defence. *Morris v Rae* has now extended the doctrine in two further respects. First, there can be eviction even though no action was raised at all; it is enough that the challenger makes a claim which is bound to succeed. Secondly, the title of the challenger need not be complete provided he has the certain and immediate means of completing it.<sup>29</sup>

Both extensions are to be welcomed although only the second was much in doubt. They are fully consistent with the purpose of requiring eviction, which is to confine warrandice claims to titles which are bad in fact as well as in law – to titles, in other words, where the buyer is subject to an active and ultimately successful challenge by a third party. So long, therefore, as a challenge is made, and is sure of success, there is no sense in insisting on litigation or on any particular form of title in the challenger. In the face of an irresistible challenge, the buyer should be allowed to cut

22 Paras 52-55 relying in particular on *Westville Shipping Co Ltd v Abram Steamship Co Ltd* 1923 SC (HL) 68. In the present case, of course, no action was raised by Craig against Ransom.

23 Para 51. See also para 26 per Lord Hope.

24 Para 47.

25 Para 26 per Lord Hope. In such cases “the party who made the threat was... in as good a position to make good the threat as he would have been if the real right had already been vested in him”.

26 Para 51.

27 Stair, *Inst* 2.3.46. For the same, practical, reasons other countries have developed the same rule.

28 1986 SLT 217.

29 Para 47 per Lord Reed (where “for example he has an unqualified right to demand an immediate conveyance of it”).

his losses, and in so doing to cut the amount which the seller must now pay out in warrandice.

A number of further points may be made. First, there is a difference between (i) facts which amount to (extra-judicial) eviction and (ii) facts which remove the need for eviction altogether. Settling a claim, as in *Morris v Rae*, is an example of the first;<sup>30</sup> a competing deed by the seller is an example of the second.<sup>31</sup> Importantly, in the second case (but not the first), no challenge by the competitor is needed, the mere grant of the competing deed being enough. This distinction, however, is masked by language, with the first case sometimes being described as no more than a *threat* of eviction rather than as eviction itself. The potential for misunderstanding is captured in Lord Hope's opening statement that "[t]here can be eviction . . . if eviction is threatened".<sup>32</sup>

Secondly, the case was decided in the Division, and argued on appeal, on the basis that the crucial time—the time when Craig must be shown to have had a right to the property—was when the threat was made. But even if this is correct, it seems a mistake to confine this time to a single day, the day (18 November 2005) when Craig's letter was sent. Little was clear-cut in the facts of *Morris v Rae*. Craig and Ransom were in negotiation for months. Letters were sent; threats were issued; offers were made. Matters became more complicated still when the problem with Craig's title emerged. The challenge to Ransom was a process rather than a single event, and that process did not come to an end until, in March 2006, the parties finally came to terms.

More fundamentally, the focus on the time of the *threat* may itself be a mistake. Where a warrandice claim depends on eviction, and where the eviction is non-judicial—by voluntary surrender (or accommodation)<sup>33</sup>—what matters is that the surrender is made to the right person and for a good reason. And, logically, the time for determining these matters is the time of the surrender, i.e. of the eviction itself. Admittedly, the position may be different in the case of judicial eviction, for there the pursuer must have title to sue. But where the eviction is extra-judicial, it is the eviction itself which seems important and not the threat or claim on which the eviction proceeds. Indeed that seems to have been the view of Lord Hope (although the issue is not discussed as such) because he concludes his opinion by saying that "the pursuer will be entitled to the remedy he seeks if he can prove that, *when RDL [Ransom] yielded to the threat*, JCL [Craig] would have been immediately able to

30 On this point my views have changed: compare K G C Reid, "Warrandice in the sale of land", in D J Cusine (ed), *A Scots Conveyancing Miscellany: Essays in Honour of Professor J M Halliday* (1987) 152 at 158 with Reid, *Property* (n 5) para 707. In *Morris* at para 22 Lord Hope relies on the analysis given in the earlier of these publications. See also Bell, *Prin* § 895.

31 An example is *Smith v Ross* (1672) Mor 16,596.

32 Para 1. See also paras 18 and 45.

33 According to R J Pothier, *Treatise on the Contract of Sale* (tr L S Cushing, 1839) §§ 83 and 95, eviction is "abandonment" of the property to the challenger, whether voluntarily or as a result of a court decree. In similar vein, M P Brown, *A Treatise on the Law of Sale* (1822), writes of eviction occurring "when a party is deprived of a subject by the sentence of a judge" (§ 330) or "where the vendee has delivered up the subject to the party claiming it, without a law-suit" (§ 353). Reaching an accommodation with the challenger (e.g. to acquire the property) is the equivalent of abandonment or delivering up.

secure title to the disputed part”.<sup>34</sup> As it happens, on the facts of *Morris v Rae* it made no difference whether Craig’s title was evaluated in November 2005 or in March 2006, for it was unchanged between these dates. But it might easily have been otherwise. If the title defect had been spotted in time, so that Ransom paid in exchange for a disposition which was valid,<sup>35</sup> the surrender to Craig would have been on the basis of an irreproachable title and the doubts and disputes about whether eviction had taken place would never have arisen.

A third point concerns Craig’s title. The absence of a real right was excused by the alleged existence of a personal right. The nature of that personal right, however, was not examined nor indeed, so far as the opinions are concerned, disclosed. Although the pursuer described Mr Lynch’s title as “voidable”,<sup>36</sup> the corresponding remedy accorded to Craig was said to extend beyond reduction to rectification or alternatively the right to a corrective reconveyance.<sup>37</sup> Rectification indicates a reliance on section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 and the doctrine of error in expression;<sup>38</sup> a reconveyance might suggest a claim in unjustified enrichment. The former, however, as Lord Walker pointed out, is discretionary,<sup>39</sup> the latter subject to various defences. In view of the court’s requirement that Craig have “an unqualified title, exercisable immediately, to demand a transfer of the title vested in Mr Lynch”,<sup>40</sup> it is surprising that the nature of that title was left unexplored.

Finally, *Morris v Rae* can be seen as another stage in a gradual retreat from the rigours of eviction. The logical end result may be the abandonment of the requirement altogether, as has happened in some other countries,<sup>41</sup> although presumably this would require legislation. Already, no eviction is needed for claims under missives.<sup>42</sup> To extend this rule to warrandice in dispositions would be a welcome acknowledgment that, even without eviction, a bad title can lead to significant loss.

*Kenneth G C Reid*  
*University of Edinburgh*

34 Para 32, emphasis added. But compare para 2 where Lord Hope mentions indiscriminately the date of the threat and the date of surrender. It is possible that Lord Hope was not using “yielding to the threat” in the technical sense of eviction.

35 This is on the assumption that Mr Lynch was owner of the missing area. But see n 2 above.

36 Para 48.

37 Para 57.

38 The pursuer’s averments on this point are quoted in 2011 SC 654 at para 6.

39 Para 59.

40 Para 57 per Lord Reed. Lord Hope imposed the additional requirement “that no proceedings would have been required to secure that result” (para 32), by which seems to be meant that it must have been clear in advance that Mr Lynch would co-operate. It is not explained why the prospect of litigation, even if bound to succeed, would be fatal to Craig’s title.

41 See e.g., Louisiana Civil Code art 2500, which retains the language of eviction but not its substance. For a discussion, see D Tooley-Knoble and D Gruning, *Louisiana Civil Law Treatise Volume 24: Sales* (2012) § 10:5.

42 It is assumed that a claim under missives was not open to Ransom, perhaps because the title was not guaranteed there or because the missives had expired.

## Secured Transactions Reform

Security over moveables is an area where law reform has been slow both in England and Scotland. The last major innovation north of the border was the introduction of the floating charge in 1961.<sup>1</sup> UK-wide reforms were suggested by the Crowther Report (1971) and the Diamond Report (1989), and Scotland-only changes by the Halliday Report (1986) and the Murray Report (1994).<sup>2</sup> But none were implemented.<sup>3</sup> More recently the Scottish Law Commission's Report on Registration of Rights in Security by Companies (2004)<sup>4</sup> led to Part 2 of the Bankruptcy and Diligence etc (Scotland) Act 2007, which recasts the rules on Scottish floating charges. Very unusually for something which has been on the statute book for six years it has not been brought into force.<sup>5</sup> The Law Commission of England and Wales, in papers published in 2002<sup>6</sup> and 2004,<sup>7</sup> proposed a root-and-branch reform of the moveable security regime south of the border based on a notice-filing system, as exemplified by article 9 of the Uniform Commercial Code ("UCC") of the USA and the Personal Property Securities Acts ("PPSA"s) of the Canadian provinces and New Zealand. In a subsequent report of 2005, following significant opposition from stakeholders, the Commission drew back and recommended a more limited set of proposals.<sup>8</sup> But even these were not implemented.<sup>9</sup>

In contrast to the relative inertia in the UK there have been several notable international developments in recent years. Book IX of the Draft Common Frame of Reference ("DCFR"), published in 2009, proposes a PPSA-type approach for the European Union.<sup>10</sup> The Belgian Parliament is presently considering proposals to reform the law of security over moveables along PPSA-lines as mediated through the DCFR Book IX, following the recommendations of a committee chaired by Professor

1 Companies (Floating Charges) (Scotland) Act 1961.

2 For an overview of all these reports, see Discussion Paper on *Moveable Transactions* (Scot Law Com DP No 151, 2011) ch 10.

3 Except for the recommendations in the Crowther Report which led to the Consumer Credit Act 1974.

4 Scot Law Com No 197, 2004.

5 Even more unusually, the Scottish Government set up a technical working group, and conducted a consultation, to consider the question of whether Part 2 should be brought into force at all. See further <http://www.scotland.gov.uk/Topics/Justice/law/damages/company>. The key issue is the effect of the new legislation on floating charges granted by English companies in relation to Scottish assets.

6 *Registration of Security Interests: Company Charges and Property other than Land* (Law Com CP No 164, 2002).

7 *Company Security Interests: A Consultative Report* (Law Com CP No 176, 2004).

8 *Company Security Interests* (Law Com No 296, 2005).

9 See H Beale, "The exportability of North American chattel security regimes: the fate of the English Law Commission's proposals" (2006) 43 Canadian Business LJ 177.

10 See e.g. A Veneziano, "The DCFR Book on Secured Transactions: some policy choices made by the Working Group", in S van Erp, A Salomons and B Akkermans (eds), *The Future of European Property Law* (2012) 123-136.

Eric Dirix which reported in 2011. In January 2012 Australia brought its PPSA of 2009 into force.<sup>11</sup> The Security Interests (Jersey) Law 2012 will shortly introduce a PPSA-type approach to security over incorporeal (intangible) moveable property on the island.

In England a group set up by Sir Roy Goode is now working on the case for radical reform.<sup>12</sup> The Scottish Law Commission<sup>13</sup> for its part was asked to look at reform of security over moveable property in its Eighth Programme of Law Reform and in 2011 published its Discussion Paper on Moveable Transactions.<sup>14</sup> It is now working towards a Report and draft Bill with the aim of introducing a new type of registered moveable security. In this context the publication of a Discussion Paper on Secured Transactions Reform by a working party of the Financial Law Committee of the City of London Law Society<sup>15</sup> is a timely and interesting development. It is timely because the Commission necessarily has an eye to the position in England given the general UK-wide commercial law context. It is interesting because the Society was one of the main opponents of the reforms proposed by the Law Commission mentioned above.<sup>16</sup> The Working Party makes 15 recommendations which it thinks would be of benefit to law and finance in England and Wales. Consideration here will be confined to those which are of particular relevance to the Commission's project.

### A. SCOPE AND APPROACH

The Working Party's remit is partly wider and partly narrower than the moveable transactions project of the Commission.<sup>17</sup> It covers security law as a whole, while the Commission's project is restricted to security over moveables.<sup>18</sup> The Working Party also considers aspects of insolvency law as well as guarantees and set-off, which the Commission's project does not. Both the Commission and the Working Party consider the outright sale of receivables, but while the Commission's remit extends to securities granted by consumers and unincorporated businesses, the Working Party confines itself to transactions by companies. Compared with the Commission's Discussion Paper on Moveable Transactions, the paper produced by the Working Party is at a higher level of generality.

11 See e.g. A Duggan, "A PPSA primer" (2011) 35 Melbourne University LR 865. Papua New Guinea has also recently enacted a PPSA.

12 See H Beale, M Bridge, L Gullifer and E Lomnicka, *The Law of Security and Title-Based Financing*, 2<sup>nd</sup> edn (2012) para 23.159. And see <http://securedtransactionsproject.wordpress.com>.

13 Henceforth "the Commission".

14 See n 2 above. See also the symposium of papers at (2012) 16 EdinLR 261.

15 Henceforth "Working Party". See City of London Law Society, *Discussion Paper: Secured Transactions Reform* (2012), available at <http://www.citysolicitors.org.uk/FileServer.aspx?oID=1290&IID=0>.

16 See G McCormack, "Pressured by the Paradigm: the Law Commission and Company Security Interest", in J de Lacy (ed), *The Reform of UK Personal Property Security Law: Comparative Perspectives* (2010) 83 at 84. See also the contribution to the same volume of essays by Richard Calnan, the chairman of the working party which produced the Discussion Paper: "What is wrong with the law of security?", *ibid* at 162.

17 City of London Law Society, *Secured Transactions Reform* (n 15) paras 2.1-2.5.

18 Although the Commission is to have a subsequent project dealing with security over land: *Eighth Programme of Law Reform* (Scot Law Com No 220, 2010) paras 2.27-2.33.

The Working Party's approach is to measure current English law "against certain principles which we consider to be at the heart of a good secured transactions law."<sup>19</sup> The PPSAs are dismissed as a model for reform since they are "based on concepts adopted in the United States to meet its needs in the mid-twentieth century". Rather, what is needed is "a law of security that meets the requirements of the twenty-first century."<sup>20</sup> This may be viewed as somewhat harsh given the ongoing evolution of the PPSA model not least through the DCFR.

The Working Party's view is that four principles should inform a modern security law: (1) simplicity; (2) flexibility; (3) freedom; and (4) transparency. On the first, the PPSA model has attracted criticism for being complex.<sup>21</sup> On the second, flexibility, the law should be sufficiently flexible to meet the needs of commerce. This leads to the third principle: the freedom of the parties to structure commercial transactions as they wish. The Working Party, however, rightly sounds a warning note: "The law of security is a part of the law of property, and therefore cannot simply be based on freedom of contract."<sup>22</sup> The fourth principle - of transparency - informed the Commission in its proposals for a new Register of Moveable Transactions in which assignments of incorporeal moveables and the proposed new security over moveables could be registered.<sup>23</sup>

## B. SPECIFIC RECOMMENDATIONS

### (1) A universal security right

The Working Party's first recommendation is perhaps the most striking one: the practicality of establishing a single universal security interest should be investigated.<sup>24</sup> Whilst the Working Party does not think that the variety of different types of security interest causes difficulties in practice, it feels that the introduction of a universal security interest with clear and straightforward rules as to creation, perfection, priority and enforcement would be beneficial in removing areas of uncertainty and making the law more accessible. At first blush this appears to suggest the introduction of a PPSA-type system. In fact, however, the approach is rather narrower. What is being proposed is a universal type of security to replace only the *formal* types of conventional security currently recognised in England, i.e., pledge, mortgage, charge and contractual lien. *Functional* securities such as retention of title, sale and

19 City of London Law Society, *Secured Transactions Reform* (n 15) para 2.6.

20 Para 2.8.

21 The fairness or otherwise of this criticism is controversial. See e.g. A Duggan and M Gedye, "Personal property security reform in Australia and New Zealand: the impetus for change" (2009) 27 Penn State Int LR 655 at 666: "The complaint that there are too many rules calls to mind the Austrian Emperor Joseph II's reputed gripe to Mozart that *Don Giovanni* had too many notes, and is hardly less fatuous." If, however, the criticism is justified, it is of particular relevance to the Commission, one of whose statutory objectives is to simplify the law: Law Commissions Act 1965 s 3(1).

22 City of London Law Society, *Secured Transactions Reform* (n 15) para 2.19.

23 Discussion Paper on *Moveable Transactions* (n 2) para 16.13.

24 City of London Law Society, *Secured Transactions Reform* (n 15) para 3.11. This is described at para 1.2 as "a useful long-term goal".

leaseback, and assignments for security purposes fall outwith the proposal. To put it in PPSA-language, there would be no “recharacterisation” of these as securities, requiring them to be registered. This is also the Commission’s provisional approach.<sup>25</sup> The Working Party justifies this approach by saying:<sup>26</sup>

We can see no reason why the parties’ legal rights should be overridden merely because the transaction may be said to have the same economic effect [as a security]. This is not a case of making sure that the form of the transaction follows the substance. The substance of the transaction is that the person in possession of the asset has never obtained title to it and cannot create security over it.

This is controversial and a PPSA supporter would disagree. Of course some PPSA-influenced models take a more diluted approach to reservation of title. For example, under the DCFR Book IX no registration is required where the buyer is a consumer. In other cases there is a 35 day grace period after agreeing the reservation during which it will have third party effect although there has not been registration.<sup>27</sup>

A further striking feature of the Working Party’s proposal is that although narrower than the PPSA approach as just described, it is also wider because the new universal security right could be granted over land. The Working Party also favours a universalist approach to enforcement procedures of securities which currently exist.<sup>28</sup>

## **(2) Registration of assignments (assignments)**

The argument that a person who has never had title to an asset cannot grant a security over it cannot be made as regards an assignment (assignment) for security purposes. Whilst this is actually a transfer of an asset, it is recharacterised as a security under the PPSA approach. While the Working Party opposes recharacterisation it sees merit in establishing a register to regulate the priority of such transfers.<sup>29</sup> Behind this proposal is a desire to improve on England’s current complex equitable priority rules. Scots law of course does not have these rules of equity. But the Commission too is of the provisional view that it should be possible to register assignments.<sup>30</sup> This would be an alternative to the need for intimation (notification) to the debtor which, unlike under English equity, is required in Scotland and in commercial cases can often be cumbersome. But, like the Working Party’s proposal, registration and priority would be linked.

25 Discussion Paper on *Moveable Transactions* (n 2) para 21.26.

26 City of London Law Society, *Secured Transactions Reform* (n 15) para 7.20. The argument was advanced with particular reference to reservation of title.

27 DCFR Book IX.–3:107. The new legislative scheme being considered in Belgium goes further and excludes reservation of title.

28 City of London Law Society, *Secured Transactions Reform* (n 15) paras 4.2–4.7.

29 Paras 7.21–7.26.

30 Discussion Paper on *Moveable Transactions* (n 2) para 14.27.



### (3) Registration of company charges

The Working Party evaluates the current rules on registration of company charges (securities) in the context of the changes which at the time of writing were due to be introduced in April 2013.<sup>31</sup> Like the Commission it favours the need for securities granted by companies to be registered for reasons of transparency. It also supports the abolition of the “twenty-one day invisibility period” under which a charge acquires priority on signing provided it is registered at Companies House within three weeks. This proposal is to be welcomed in Scotland where the rule has caused difficulty in practice.<sup>32</sup> Since the Working Party essentially confines itself to security granted by companies<sup>33</sup> it naturally sees the way forward as reforming the rules on registration at Companies House. In contrast the Commission is looking at the introduction of a new security which could potentially be granted by consumers (with appropriate restrictions), sole traders, partnerships and companies: in fact by persons generally. Hence the proposal that the new Register of Moveable Transactions be administered by Registers of Scotland. But in respect of companies it would be key to have an information-sharing arrangement with Companies House to avoid the need for dual registration.<sup>34</sup>

### (4) Fixed and floating charges

The Working Party rightly criticises the lack of clarity as to what constitutes a fixed as opposed to a floating charge as doing “a great disservice to English law.”<sup>35</sup> Such is the difficulty here that the leading modern case on the subject, *In re Spectrum Plus Ltd (in liquidation)*<sup>36</sup> prompted a book of essays.<sup>37</sup> The fixed/floating distinction is crucial in corporate insolvency law because fixed charges have a higher ranking. In its project the Commission is mindful of the distinction but corporate insolvency law is UK-wide and outwith its scope. At the moment there is not the same difficulty in Scotland because fixed charges over moveable property are not recognised. The Commission’s proposals for a new moveable security will raise issues which will have to be addressed within the context of the fixed/floating distinction. The Working Party’s search for solutions to improve the law here is to be welcomed.

### (5) Restrictions on assignment

The Working Party considers the issue of restrictions on assignment.<sup>38</sup> Again this is something which the Commission has been considering as part of its project and

31 City of London Law Society, *Secured Transactions Reform* (n 15) paras 3.38-3.61.

32 *AIB Finance Ltd v Bank of Scotland* 1995 SLT 2.

33 There is some discussion of security granted by individuals at paras 3.68-3.73, including the suggestion to give unincorporated businesses a registration number and extend the company registration system to them.

34 This would be possible under the Companies Act 2006 s 893.

35 City of London Law Society, *Secured Transactions Reform* (n 15) paras 4.15-4.25.

36 [2005] UKHL 41, [2005] 2 AC 680.

37 J Getzler and J Payne (eds), *Company Charges: Spectrum and Beyond* (2006).

38 City of London Law Society, *Secured Transactions Reform* (n 15) paras 3.30-3.36.

on which it specifically sought the views of consultees.<sup>39</sup> In Scotland, as in England, an assignation of a contractual right which is barred by the contract is ineffective.<sup>40</sup> The provisional view of the Commission was that this rule should not be altered. Representations had been made to it that to do so “could upset carefully structured contracts”.<sup>41</sup> While the Working Party supports the enforcement of such restrictions in principle as a matter of freedom of contract, it considers that it might still be possible for a security to be granted over the right, without adversely affecting the position of the party which imposed the restriction. Nevertheless, it admits that this is a difficult issue. The same could be said about the reform of the law of security over moveable property in general. The debate as to how best to do this both north and south of the border is certain to continue for some time.

*Andrew J M Steven*  
*Scottish Law Commission*

*(The author is the lead Commissioner on the Scottish Law Commission’s project on moveable transactions but this article is written in a personal capacity and should not be taken to represent the views of the Commission.)*

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## A Regency Drama: Misrepresentation by Appearance, Reduction and *Restitutio in Integrum*

In the recent Outer House decision of *Lyon & Turnbull v Sabine* (henceforth “Sabine”)<sup>1</sup> some interesting judicial comments were offered on whether the mere appearance of goods might constitute an actionable misrepresentation and on whether, when a party seeks to reduce a contract concluded in reliance on an innocent misrepresentation, a claim for the restitution of money transferred under the avoided contract is a contractual remedy or one deriving from unjustified enrichment. A somewhat different view on both questions to that offered from the bench is set out below.

### A. THE FACTS OF THE CASE

Sabine concerned the auction of a purported Regency dining table by the pursuer, a well-known firm of auctioneers, on behalf of its client, the defender. The pursuer had undertaken to act as agent for the sale of the table, which it decided to offer for

<sup>39</sup> Discussion Paper on *Moveable Transactions* (n 2) paras 14.52-14.57.

<sup>40</sup> *James Scott Ltd v Apollo Engineering Ltd* 2000 SLT 1262; *Linden Gardens Trust Ltd v Lenesta Sludge Disposal Ltd* [1994] 1 AC 85.

<sup>41</sup> Discussion Paper on *Moveable Transactions* (n 2) para 14.57.

<sup>1</sup> [2012] CSOH 178.

sale at one of its periodic “fine antiques” auctions. The table was sold for £15,000 to a third party, the pursuer then deducting its fee and other applicable amounts before transferring the balance of £13,666 to the defender. Following the sale, the third party challenged the authenticity of the table as a Regency table. Further investigation led to the conclusion that it was a fake. After examination an independent antiques expert described it as “a piece made to deceive”.<sup>2</sup> The pursuer refunded the purchase price to the third party, took back possession of the table and then sought to reclaim the money paid to the defender, offering to return the table in exchange. However, the defender refused and the pursuer subsequently raised an action in the Outer House seeking reduction (rescission) of the contract of agency between it and the defender on the ground of the defender’s misrepresentation as to the nature of the table as a Regency table, as well as restitution of the £13,666 paid to the defender by virtue of the principle of *restitutio in integrum* applicable in cases of voidable contracts.

## B. THE JUDGMENT

Lord Brodie held that the defender had not, by virtue of anything he had said or by virtue of simply presenting a table made to look like a Regency period antique, made an actionable misrepresentation to the pursuer.<sup>3</sup> His Lordship further questioned whether the pursuer’s claim for restitution had been given a sufficiently clear basis in its pleadings: his Lordship opined that, if the contract were to be reduced, any contractual rights of the pursuer would cease to exist so that a claim for restitution of sums paid to the defender would have to lie in unjustified enrichment, which had not been specifically averred.<sup>4</sup> Lord Brodie held that the pursuer had failed to prove what it set out to do, but added, given that the parties were agreed on the facts, that he was willing to put the case out by order to determine whether any further procedure might be appropriate.<sup>5</sup>

Lord Brodie’s approach to determining whether there had been any actionable misrepresentation, and the nature of the pursuer’s claim for restitution, merits further examination.

## C. DID THE DEFENDER MAKE A MISREPRESENTATION?

On the facts of the case, the defender might conceivably have made a misrepresentation in one of two ways: by virtue of something he said about the table, or by simply presenting a table to the pursuer which gave, by its very appearance, the misleading impression that it was a Regency table when in fact it was a modern reproduction designed to deceive as to its provenance and antiquity.

<sup>2</sup> Para 18.

<sup>3</sup> Paras 20-21.

<sup>4</sup> Para 24.

<sup>5</sup> Para 25.

**(1) Was there any misrepresentation by virtue of what the defender said?**

The defender, although an antiques dealer himself, appears not to have possessed any great knowledge of the nature of Regency period pieces.<sup>6</sup> The sum total of what he told the pursuer about the table was taken from the catalogue of the antiques house from which he had purchased the piece. He had read the following catalogue description down the telephone to the pursuer:

A Regency Mahogany Extending Dining Table stamped Wilkinson, the fold over top with three additional leaves, on six turned tapering reeded legs with brass cap castors, 102" x 50".

The description was erroneous (given that the table was a modern reproduction), thus one requirement of a misrepresentation (that it be a false or misleading statement) was met. However, for a false or misleading statement to be actionable, it must be relied upon by the party to whom it was made, i.e., it must be a cause of that party's decision to contract. Lord Brodie found no such reliance in this case since the pursuer's own employee, Mr Longwill, had inspected it. Lord Brodie held that:<sup>7</sup>

Mr Longwill came to his own assessment of the qualities and provenance of the table on the basis of his inspection of the table and an application of his expertise or that of fellow employees of the pursuer, and that that assessment informed the terms in which the table was described in the pursuer's catalogue.

The description read out on the telephone by the defender had played no material part in the pursuer's assessment of the table,<sup>8</sup> and had not been relied upon by the pursuer. Accepting these conclusions as factually accurate, it seems right to have concluded, as Lord Brodie did, that nothing the defender said amounted to an actionable misrepresentation.

**(2) Was there any misrepresentation by virtue of the appearance of the table?**

There is no doubt that the appearance of the table was deliberately got up to deceive anyone who might view or examine it.<sup>9</sup> It had been manufactured to look as if it were a genuine Regency piece, and stamped on the extending mechanism under the table were the words "Wilkinson Moorfields", designed to deceive any reader of the words that the table had been made by the firm of Wilkinsons (who manufactured and sold similar tables from their workshop in Moorfields during the Regency period).

It is clear that the mere appearance of goods can constitute a misrepresentation if, for instance, the goods give the impression of being antique when they are not, or of being of a specific provenance when they are not, as was held in

6 Lord Brodie noted, for instance, that the defender appeared not to appreciate that the Prince Regent had succeeded to the throne as King George IV: see para 15.

7 Para 15.

8 Para 18.

9 Para 18: "What may be taken to have deceived Mr Longwill, and such other experts who were involved, was the appearance of the table; it was, after all, as parties are now agreed, 'a piece made to deceive'."

*Patterson v Landsberg & Son*.<sup>10</sup> In that case, the purchaser of certain items of jewellery erroneously believed them to be antique when they were in fact modern reproductions. The specific question before the court was whether there was any intentional misrepresentation of the goods, in other words whether fraud was present. The Inner House thought so, on the basis both of what was said by the seller but also (in Lord Kyllachy's view) by virtue of the appearance and presentation of the items. Noteworthy in this regard is Lord Kyllachy's comment that:<sup>11</sup>

I must say I incline to hold upon the proof, and indeed upon the defender's own evidence, (1) that the appearance of age and other appearances presented by these articles constituted by themselves misrepresentations; in short, that the case is really one of *res ipsa loquitur*.

Subsequently, in *Edgar v Hector*<sup>12</sup> the decision in *Patterson* was referred to in the First Division as a case where the age and appearance of the items constituted by themselves misrepresentations.<sup>13</sup>

One might have thought that this view would have persuaded Lord Brodie to hold that the mere appearance of the table in the case before him would similarly have constituted a misrepresentation, albeit an innocent one given the defender's lack of knowledge as to the table's real identity as a fake. Lord Brodie was, however, at pains to distinguish *Patterson*. His concern appears to have been that *Patterson* was a case of fraud, whereas the case before him was not. His Lordship noted that in *Patterson* Lord Kyllachy had continued, directly after the portion of his judgment quoted above:<sup>14</sup>

(2) that this being so, the defender was not entitled to leave, as he says he did, the articles to speak for themselves, but was bound to displace the inferences which the appearance of the articles was to his knowledge bound to suggest.

Lord Brodie rightly notes that what was crucial to liability in *Patterson* was fraud on the part of the defender: the defender knew the real position, and thus ought (as Lord Kyllachy notes) to have countered the false impression in order to avoid liability for fraud. That is undoubtedly correct. But this ought not to mean that the absence of any fraudulent intent on the part of the defender in the case before him (or indeed, of any negligence on the defender's part, given that he had no expertise in relation to Regency period pieces and thus could not reasonably be held to have owed a duty of care to warn that the piece might be a fake) also meant that no misrepresentation of any kind had been made. If Lord Kyllachy is correct (which it is suggested he is) that the appearance of items can itself constitute a misrepresentation, then the fact that such a misrepresentation is not fraudulent does not lead to the conclusion that it is not a misrepresentation. Yet that is what Lord Brodie appears to suggest:<sup>15</sup>

<sup>10</sup> (1905) 7 F 675.

<sup>11</sup> At 681.

<sup>12</sup> 1912 SC 348.

<sup>13</sup> At 352 per Lord Mackenzie.

<sup>14</sup> (1905) 7 F 675 at 681.

<sup>15</sup> *Sabine* at para 19.

I accept that there are circumstances in which silence can amount to a statement and information can be communicated other than by words but essentially a representation, and therefore a misrepresentation, is the communication of information concerning a thing or a state of affairs.

Lord Brodie appears to mean that if the appearance of goods alone suggests they are a Regency piece manufactured by a specific firm those misleading aspects of their nature are not “information concerning a thing or state of affairs”. That seems an unnecessarily narrow view of the concept of factual information, one not supported by *Patterson v Landsberg*.

It is therefore suggested that the deceptive appearance of the table ought, of itself, to have been considered capable of constituting a misrepresentation, albeit one made innocently on the defender's part. The only question then would have been whether such a misrepresentation could be considered a cause (not necessarily the only cause) of the pursuer's decision to contract, in other words whether as a matter of fact it induced the pursuer, in reliance on the misrepresentation, to enter the contract.<sup>16</sup> Although this issue was not specifically considered by Lord Brodie, his analysis of the facts, in particular his description of how the inspection of the goods (rather than what the defender said about them) persuaded the valuer to assess them as a Regency table manufactured by Wilkinsons, would suggest that that was the case, although this issue was not specifically considered by Lord Brodie given his conclusion that the mere appearance of the table was not capable of constituting a misrepresentation.

On the question of misrepresentation then, it is suggested that there was a misrepresentation made by virtue of the deceptive appearance of the goods and, therefore, that the further question of whether such a misrepresentation induced the contract ought to have been considered. Had the view been reached that it was such a cause, then the contract of agency ought *prima facie* to have been voidable at the instance of the pursuer. All that might have prevented such avoidance would have been the inability of the pursuer to effect *restitutio in integrum* of the defender to his pre-contractual position.

#### **D. THE NATURE AND AVAILABILITY OF THE CLAIM FOR RESTITUTIO IN INTEGRUM**

The term *restitutio in integrum* has, in a contractual setting, been used to describe both a condition for unwinding a voidable contract (the condition being a restoration by the party (A) seeking to reduce the contract of the other party (B) to B's pre-contractual position) as well as the remedy sought (the restoration by B of A to A's

<sup>16</sup> Though it might be argued that the pursuer was careless in its inspection, even were that the case this is unlikely to have prevented the pursuer seeking to reduce the contract (whatever the effect of any negligence might have been on a claim for damages in delict). Though the Scots law position on that question seems unclear, in England it is settled that where rescission is sought for misrepresentation carelessness on the part of the claimant does not affect its entitlement to rescind: see J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (2007) para 4.35 and authorities cited there.

pre-contractual position).<sup>17</sup> In totality then, the concept has been used to refer to a mutual unwinding of a voidable contract.<sup>18</sup>

In the sense of a condition for reduction of a contract, the simple rule is that before A is permitted to unwind a voidable contract it must be able to restore B to its pre-contractual position. Such a condition was narrated by Lord Cranworth in *Western Bank of Scotland v Addie*,<sup>19</sup> who commented that *restitutio in integrum* may be claimed only where “the party seeking it is able to put those against whom it is asked in the same situation in which they stood when the contract was entered into.” That was not a problem in the case before Lord Brodie: the table had been returned by the third party purchaser to the pursuer, who was willing to restore it to the defender. The lack of any difficulty with the pursuer’s being able to meet the conditional sense of *restitutio in integrum* suggests that there should have been no problem with its remedial sense, i.e. with the pursuer’s claim that the defender also be ordered to effect restitution. In most cases, all other things being equal, it will be an equitable and natural consequence of the reduction of a contract, following the pursuer’s restoration of the defender to its pre-contractual position, that the defender also restore what it received under the now avoided contract.

Lord Brodie, however, had his doubts about the appropriateness of the pursuer’s claim to restitution, viewing such a claim as one for the restoration of an unjustifiably retained enrichment:<sup>20</sup>

...once the contract is gone, a claim for repetition of money paid over must be on some other basis... A non-contractual claim for repetition is suggestive of some aspect of unjustified enrichment.

Lord Brodie saw two difficulties for the pursuer in making such an enrichment claim. Questioning the mutual restoration of the parties as the usually equitable outcome (contrary to what is suggested above), Lord Brodie remarked that in seeking reduction of the contract, “the pursuer would be throwing away rights it has against the defender”<sup>21</sup> and he doubted the equities of allowing a party who had thus thrown away its rights a remedy in unjustified enrichment. Leaving aside for the moment the question of whether *restitutio in integrum* should properly be characterised as an unjustified enrichment claim, there are two problems with Lord Brodie’s objection to the equities of effecting mutual restoration of the parties. First, there is no authority for the view that, in seeking reduction of a contract, a contracting party is somehow “throwing its rights away”: on the contrary, the fact that the right to restitution of the party seeking to reduce the contract can only be granted after the contract has been avoided suggests that reduction is undertaken precisely in order to vindicate rights

17 See further on this point M Hogg, *Obligations*, 2<sup>nd</sup> edn (2006) paras 4.144-4.146.

18 It should also be noted, however, that use of the term is also encountered outside contract law: so, for instance, the remedy of damages in delict has sometimes been described as seeking to effect, in monetary terms, “restitutio in integrum” of the injured party to its position before commission of the delict (for instance in *Pomphrey v Cuthbertson* 1951 SC 147).

19 (1867) 5 M (HL) 80.

20 *Sabine* at para 24.

21 Para 23.

and not to throw them away. Secondly, it is not clear exactly what Lord Brodie thinks the pursuer was “throwing away”: the defender had not breached his contract, so no remedies for breach were available; nor had the defender failed to implement any term of his contract, so no remedies to enforce performance were available. His Lordship’s suggestion that something was being “thrown away” by the pursuer in reducing the contract is tantalisingly opaque.

The second difficulty Lord Brodie saw with an unjustified enrichment claim was the pursuer’s failure to advance such a claim properly in the written pleadings:<sup>22</sup>

...one would expect some identifiable basis [in unjustified enrichment] set out in the pleadings and preferably a specific plea-in-law. I do not find that in the present case... on the way the pursuer’s case is pled, not only is there no factual basis for recovery, there is no comprehensible legal basis for recovery.

The appropriateness of this criticism depends fundamentally, of course, on whether a claim for restitution of money paid under a voidable contract lies in unjustified enrichment or not.

It is clear that restitution of money or property transferred under a void contract is effected by means of remedies lying in unjustified enrichment: the recent case of *Morgan Guaranty Trust Co of New York v Lothian Regional Council*<sup>23</sup> is sufficient authority for that proposition. On the other hand, while a definitive judicial statement on the matter is hard to find, the operation of *restitutio in integrum* appears traditionally not to have been seen in Scots law as an example of unjustified enrichment, but rather as a contractual remedy (albeit one designed to effect restitution). The preponderance of academic opinion supports this view: Hector MacQueen has described *restitutio in integrum* as part of a body of “contract rules”,<sup>24</sup> and both Saul Miller and the present author have taken a similar view.<sup>25</sup> On the other hand, Robin Evans-Jones’s treatment of the doctrine appears to proceed on the implicit understanding that it is an aspect of unjustified enrichment.<sup>26</sup> A contractual view of *restitutio in integrum* is taken by South African law,<sup>27</sup> though it has been argued academically that an enrichment view would be preferable.<sup>28</sup> As for the Scottish cases, contrary to what has been argued ought to be the law

<sup>22</sup> Para 24.

<sup>23</sup> 1995 SC 151.

<sup>24</sup> H L MacQueen, “Contract, unjustified enrichment and concurrent liability: a Scots perspective” 1997 Acta Juridica 176 at 208.

<sup>25</sup> S Miller, “Unjustified enrichment and failed contracts”, in R Zimmermann, D Visser and K Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 437 at 460-466.

<sup>26</sup> R Evans-Jones, *Unjustified Enrichment Vol. I: Enrichment by Deliberate Conferral – Condictio* (2003) paras 9.125-9.132.

<sup>27</sup> For discussion of the South African position, see J du Plessis, *The South African Law of Unjustified Enrichment* (2012) 69: “in modern South African law [*restitutio in integrum*] denotes a contractual remedy whereby the parties are put into the same position which they would have been in, had the contract not been concluded.”

<sup>28</sup> See D Visser, “Rethinking unjustified enrichment: a perspective of the competition between contractual and enrichment remedies” 1992 Acta Juridica 203 at 224.



by those favouring an unjustified enrichment solution, a study of cases in which the question of *restitutio in integrum* has arisen reveals no judicial characterisation of the remedial entitlement sought in terms of unjustified enrichment (or even “quasi-contract”). The discussion in the cases proceeds on an apparent judicial view that what is being ordered flows from an election to reduce the contract and a remedial consequence that does not need to be described by reference to any of the traditional actions (now remedies) of repetition, restitution or recompense lying in unjustified enrichment.<sup>29</sup> Were the effecting of mutual restitution following avoidance of a voidable contract genuinely a matter of unjustified enrichment, then the traditionally strict condition for reduction, that the parties be restored to their exact pre-contractual position (i.e. that the restitution be “*in integrum*”), would not be insisted upon. An unjustified enrichment approach would be entirely amenable to permitting a remedy in recompense against a party unable to effect exact restitution<sup>30</sup> but that is not the law. While the traditional insistence upon the pre-condition of *restitutio in integrum* before a voidable contract may be unwound is not a conclusive sign that the law views the mutual unwinding of a voidable contract as a contractual response, such a characterisation reflects the majority academic view of the law as it presently is, and is consistent with an absence of judicial use of the language of, or application of the rules of, unjustified enrichment in relation to *restitutio in integrum*.

Given all of this, Lord Brodie’s insistence that the remedy sought against the defender should have been pled in unjustified enrichment terms is questionable, albeit that the precise nature of the mutual unwinding of parties’ positions following reduction of a voidable contract would benefit from authoritative clarification by the Scottish courts.

## E. CONCLUSION

Lord Brodie’s decision in *Sabine* is noteworthy in raising two important matters of law regarding reduction of a contract for misrepresentation and the subsequent claim for restitution of the party seeking to reduce the contract. It has been suggested that the decision ought to have been different in two respects, namely:

- (i) The defender should have been found to have made an innocent misrepresentation by virtue of the way in which the table gave the appearance of

29 See for instance, *Western Bank of Scotland v Addie* (1867) 5 M (HL) 80; *Boyd & Forrest v Glasgow & South Western Railway Company* 1915 SC (HL) 20; *Westville Shipping Co v Abram Steamship Co* 1922 SC 571; *Fortune v Fraser* 1995 SC 186. In none of these cases is there any judicial characterisation of the claim for *restitutio in integrum* in terms of unjustified enrichment or “quasi-contract”. In *Houldsworth v City of Glasgow Bank* (1879) 6 R 1164, there is discussion in the judgment of the Lord President (at 1168) of a possible claim for rescission (i.e. reduction) and *restitutio in integrum*, and quite separately (at 1170) of what is presented as an alternative claim of “repetition” of the “benefit” taken by the defender (a description consistent with the enrichment-based nature of such a claim for repetition). This separate discussion suggests a judicial separation of the claim for *restitutio in integrum* from that of repetition.

30 That is the clearly established principle in unjustified enrichment: see, for instance, Bell, *Prin* § 537; *Cuthbertson v Lowes* (1870) 8 M 1073.

having been made by a specific furniture maker of the Regency period when in fact it was a modern reproduction manufactured to deceive. It seems likely that a further conclusion should have been that this representation was a cause of the pursuer's decision to contract, and therefore that the contract was voidable at the instance of the pursuer (though, as Lord Brodie does not analyse the extent to which the appearance of the table affected the decision of the pursuer to act as sales agent - he does so only in relation to the oral representations of the defender, which he concludes were not a cause of the decision - no final conclusion can be made on that point);

- (ii) Assuming that the appearance of the table did indeed constitute a misrepresentation and that this caused the pursuer to contract, the pursuer, being willing to restore the defender to his pre-contractual position, should have been entitled to restitution of the sum paid to the defender by virtue of the contractual doctrine of *restitutio in integrum*. In pleading such remedial entitlement no reference should have been necessary to the principle or remedies of unjustified enrichment.

In February 2012 the Scottish and English Law Commissions jointly recommended new legislation to clarify the law on consumer remedies for misleading practices (including misrepresentations).<sup>31</sup> Any such legislation would not, however, assist the pursuer, a business party, in this case. For the foreseeable future business parties are likely to have to rely on the common law of misrepresentation as developed by the courts. It would be helpful for such legal development on, among other matters, the two issues of law discussed in this article to be given a clear steer by the Inner House.

*Martin Hogg*  
*University of Edinburgh*

<sup>31</sup> *Consumer Redress for Misleading and Aggressive Practices* (Law Com No 232, Scot Law Com No 226, 2012).